IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,

Petitioners,

against

MITSUI & CO., (U.S.A.), INC., FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE S.A., R. PAGNAN & F.lli, LOUIS DREYFUS CORPORATION and TRADAX OVERSEAS, S.A.,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Fribesco S.A. and Otello Mantovani (hereinafter referred to as "Fribesco" and "Mantovani", respectively, and collectively as "Petitioners") pray that a writ or writs of certiorari issue to review orders made in these consolidated appeals by the Appellate Division, First Department of the Supreme Court of the State of New York on June 2, 1977.

Opinions Below

The original opinion of the Supreme Court of the State of New York, New York County, Special Term, Part I (Stecher, J.), rendered in one proceeding but made ap-

plicable to all, has not been reported. A copy of the opinion is appended hereto as Appendix A.

The orders of the Appellate Division, First Department of the Supreme Court of the State of New York, affirming the orders of Special Term, upon the opinion below, are reported at —— A.D. 2nd ——, 394 N.Y.S. 2d 832-834. Copies of said orders are appended hereto as Appendix B inclusive. No opinion was rendered.

The order of the Court of Appeals of the State of New York, denying leave to appeal thereto from the orders of the Appellate Division, First Department, has not yet been officially reported. A copy thereof is appended hereto as Appendix C.

Jurisdiction

The orders of the Appellate Division, First Department as to which review is sought herein were made and entered on June 2, 1977.

An application to the Court of Appeals of the State of New York for leave to appeal thereto from the orders of the Appellate Division, as aforesaid, was timely made, and denied by the Court of Appeals by order made and entered October 18, 1977.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented

1. Where a commercial arbitration will necessarily require a determination of the function and effect of the United States Grain Standards Act (7 U.S.C. § 71 *et seq.*), the implementing regulations of the Department of Agriculture and the Department's procedural guidelines (annexed hereto as Appendix D), is the dispute arbitrable, or do the

issues involve such matters of public policy as to make the dispute referable to judicial determination?

2. Should the Court disqualify an arbitrator, or panel of arbitrators, prior to the holding of hearings in arbitration, where the record identifies each member of the available arbitration panel and his affiliations, and shows that each individual on the panel is or should be disqualified for cause, and that the panel as a whole is institutionally imbalanced in favor of one segment of the industry from which its members are to be drawn?

Statutes and Regulations Construed

United States Grain Standards Act; 7 U.S.C. §§ 71, 74 *et seq.,* particularly §§ 74, 77 and 79 (a) and (d) of 7 U.S.C. (Set forth at App. D, pp. A 16-17) (Prior to Amendment by P.L. 94-582)

Regulations of the U.S. Department of Agriculture; 7 C.F.R. § 26.110 (Set forth at App. D, pp. A 17-23)

United States Arbitration Act; 9 U.S.C. §§ 1 *et seq.,* particularly §§ 2, 5 and 10 of 9 U.S.C. (Set forth at App. D, pp. A 23-24)

Statement of the Case

Petitioners are both foreign importers of United States grain. Respondent Louis Dreyfus Corporation is one of the five major United States exporters of U.S. grain. Respondents Finagrain S.A. and Tradax Overseas S.A. are wholly-owned European subsidiaries of the two largest U.S. exporters, respectively Continental Grain Co. and Cargill Incorporated. Respondent R. Pagnan & F.lli is an Italian grain importer. Respondent Mitsui & Co. (U.S.A.), Inc. is a United States subsidiary of the giant Japanese trading firm, Mitsui & Co., Ltd.

Petitioners had contracts with respondents, each for the sale and delivery to them of 25,000 long tons of U.S. No. 3 yellow corn, which was to be supplied from the 1974/75 corn crop, for delivery f.o.b. U.S. Gulf during the period April-June, 1975. Each contract was made subject to the terms of the standard industry f.o.b. export contract, form no. 2 of the North American Export Grain Association (hereinafter "N.A.E.G.A. 2") (App. E). The N.A.E.G.A. 2 contract form, in addition to a broad arbitration clause, contains several clauses of particular significance to this proceeding:

> "Commodity—_____ In accordance with the official grain standards of the United States or Canada, whichever applicable, as in effect on contract date."
>
> "Quality—Quality and condition to be final at port/s of loading in accordance with official inspection certificate/s."
>
> "Delivery—Delivery between the dates of _____ and _____ both inclusive, at discharge end of loading spout . . ."

Petitioners, in accordance with the contracts, nominated two vessels to take delivery of the corn under the various contracts, the MOSGULF and the SIDNEY BRIDGE. When these vessels arrived at the loadports, in each case, the respective petitioner refused to take delivery of the corn unless it was provided with an inspection thereof at the spout (i.e., the point of delivery). These requests were declined in all cases by the seller to the particular petitioner, each seller asserting that the USDA Grain Inspection Manual, which mandates sampling at points remote from the loading spout, precluded the requested spout inspections. Since no accommodation could be reached, the vessels sailed without taking delivery of the corn from respondents.

Thereafter, arbitration proceedings were commenced against petitioners by respondents Mitsui and Tradax. Pagnan was made respondent in arbitrations demanded against it by respondents Finagrain and Dreyfus, as to which Pagnan passed along those claims by demanding arbitration against petitioner Fribesco. Pagnan thereafter petitioned the New York State courts for consolidation of the arbitrations demanded against it with the respective arbitrations demanded against petitioner Fribesco. In those proceedings petitioner Fribesco cross-moved for a stay of arbitration, or, in the alternative, for an order disqualifying the stipulated arbitration panel and the members thereof and appointing independent arbitrators to hear the disputes in the event arbitration were compelled. As to the claims of Mitsui and Tradax, petitioner Fribesco and petitioner Mantovani separately petitioned the State Supreme Court for a stay of arbitration under New York C.P.L.R. § 7503. In those two proceedings, the respective respondent cross-moved for an order compelling arbitration.

All four proceedings were heard by the same judge. On October 6, 1976, Justice Stecher issued his memorandum opinion (App. A) and by separate orders made the opinion applicable to each proceeding pending before him. The orders entered by Justice Stecher denied petitioners' applications for a stay of arbitration, and the alternative applications for disqualification granted respondents' applications to compel arbitration, and granted Pagnan's applications to order consolidated arbitrations.

Petitioners thereupon took appeal to the Appellate Division of the State Supreme Court, First Department, which ordered the appeals consolidated for purposes of hearing and disposition. On June 2, 1977, the Appellate Court unanimously affirmed each of the orders entered below on the basis of Justice Stecher's opinion. (App. B)—On July 1, 1977, petitioners filed a joint motion for leave to appeal

to the New York State Court of Appeals under New York C.P.L.R. § 5602 (a) (1) (i). That joint motion was denied in all respects by the Court of Appeals by an order dated and entered October 18, 1977 (App. C).

The federal questions sought to be reviewed herein were raised in the court of original instance in petitioners' original petitions for stays of arbitration in the proceedings involving respondents Mitsui and Tradax, and in the cross-motions of petitioner Fribesco in the other two proceedings. In the former, paragraphs 5 and 6 of each petition state:

> "5. Respondent's inability to provide the required certificate arises from the fact that the United States Department of Agriculture, in violation of law and its own regulations, has approved improper sampling methods.
>
> 6. This dispute involves a question relating to the public policy of the United States which cannot appropriately be determined in arbitration."

In the latter, the federal questions are discussed throughout the affidavits of David A. Botwinik in support of the cross-motions.

In all cases, the fact that the issues were federal in character was raised either in terms or by strict implication.*

The federal questions were first raised in the appellate courts in petitioners' main briefs.

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* Although these cases proceeded in the state courts, and although the court of original instance cited at least once to state law, there is no question that the contracts in question "evidence . . . transaction[s] involving commerce" within the meaning of the federal Arbitration Act (9 U.S.C. § 2). Thus, the federal act applies to these proceedings, and supplants state law to the extent they are inconsistent. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Matter of Weinrott* [*Carp*], 32 N.Y. 2d 190, 199 n.2, 344 N.Y.S. 2d 848, 856 n.2 (1973).

Reasons for Granting the Writ

The thrust of petitioners' arguments is that petitioners will be compelled to advance, in defense of their positions in arbitration, several arguments concerning the validity and meaning of the United States Grain Standards Act, the implementing regulations of the Department of Agriculture, and the Department's instruction manual, which is not generally published and is available only upon request. These are complex legislative and regulatory materials, the construction and validity of which are not generally within the competence of trade arbitrators. Moreover, as petitioners pointed out below, consideration of these contentions would be inappropriate for arbitral resolution, first, because the very enactment of the Grain Standards Act and the implementing regulations was premised upon a clear expression of congressional concern for the public policy of this country and, second, because a resolution of the issues based upon the act and regulations would have a broad effect upon the system of export grain merchandising in the United States. It was then, and continues to be petitioners' belief that such matters should be resolved, at least in the first instance, by the courts as the properly constituted forum to consider and pass upon such issues of public policy when expressed in statutes of the United States.

A second policy issue raised by petitioners which is of significance concerns that clause of the N.A.E.G.A. 2 contract which states that quality and condition of the commodity are "to be final at port/s of loading in accordance with official inspection certificate/s." Such certificates are issued under a specific congressional mandate (7 U.S.C. § 79 (d), A 17), which prescribes the effect to be given thereto as "*prima facie*". As petitioners noted below, the effect of the "certificate final" clause is to convert a rebuttable presumption prescribed by statute into a conclu-

sive presumption which protects, not the foreign buyer, as intended by Congress, but the U.S. exporter. The validity of such a device, which is imposed by the standard industry contract and is, as a result, employed in practically every sale of U.S. export grain, should be scrutinized closely by the courts, not by trade arbitrators with a vested interest in preserving the effectiveness of the clause.

Finally, petitioners challenged the competence of both the arbitral panel and the individual members thereof to decide these disputes, even if the disputes were deemed to be arbitrable, under the mandate of *Commonwealth Coatings Corp.* v. *Continental Cas. Co.*, 390 U.S. 145 (1968). As to the panel, the argument is that it is unfairly and improperly constituted and should be disqualified under either 9 U.S.C. § 5 or the court's general equity powers. As to the members of the panel, petitioners argue that virtually each such individual should be disqualified either for cause, as classically defined, or because their commercial affiliations, inevitably, would prevent them from giving petitioners' public policy positions a fair hearing, regardless of the merits thereof.

POINT I

The question of whether the instant public policy issues preclude arbitral resolution should be decided by this Court in order to enunciate a clear principle on the arbitrability of public policy matters.

By granting a writ in these cases, the Court will have an opportunity to define the parameters of the public policy exception to arbitrability, an area of law which appears to be continually evolving in the courts. In *Wilko* v. *Swan*, 346 U.S. 427 (1958), this Court declared that matters arising under the Federal Securities Act of 1933 were not arbitrable, despite 9 U.S.C. § 2, under an agreement to arbitrate future disputes, because to permit such

arbitration might implicitly interfere with the provisions of 15 U.S.C. § 77n ("Contrary stipulations void"). A similar basis has been recently employed to limit the arbitration of claims against pension plan trustees under the Employment Retirement and Income Security Act (*Lewis* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 431 F. Supp. 271 (E.D. Pa. 1977). There have, in addition, been other cases where the lower courts have limited the arbitrability of disputes where there might be interference with an implicit or explicit statutory declaration that waiver of a benefit granted under the statute is void.

On the other hand, other cases which have recognized the limitation on the arbitrability of disputes concerning matters of public policy have not been premised upon such a particularized analysis. For example, in *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F. 2d 821 (2nd Cir. 1968), a decision which, for all intents and purposes, established the non-arbitrability of anti-trust claims, the Second Circuit chose to rest its decision, not upon an implicit or explicit federal statutory prohibition, but upon a vaguely defined "public interest" in the maintenance of a competitive economy (*id.* at 826). In brief, the Circuit Court merely concluded that claims of antitrust violations are "of a character inappropriate for enforcement by arbitration." (*id.* at 825) *See*, also, *Helfenbein* v. *International Industries, Inc.*, 438 F. 2d 1068 (8th Cir. 1971); *Cobb* v. *Lewis*, 488 F. 2d 41 (5th Cir. 1974).

Another area which has been declared "inappropriate for enforcement by arbitration" involves patent validity. In *Lear, Inc.* v. *Adkins*, 395 U.S. 653 (1969), a case not involving arbitrability, this court noted the great public interest which attached to the validity of patents, to the extent that a patent licensee which, by the terms of its license, was estopped from contesting the patent's validity, would be permitted to do so, nevertheless, in the federal courts. That decision was later relied upon in a number of cases as authority for the proposition that claims of

patent validity were not arbitrable despite the existence of an arbitration clause in the relevant contract. *See*, e.g., *Beckman Instruments Inc.* v. *Technical Development Corp.*, 433 F. 2d 55 (2nd Cir. 1970), cert. den. 404 U.S. 872; *Diematic Mfg. Corp.* v. *Packaging Industries, Inc.*, 381 F. Supp. 1057 (S.D.N.Y. 1974). Again, we note that the non-arbitrability of questions concerning patent validity has not been grounded upon any statutory prohibition, but rather upon an unarticulated concept of the public interest or the national interest sufficient to preclude private arbitration of such disputes

In the present case, several critical matters of public policy will necessarily be involved in a resolution of these disputes. One such matter is the construction, meaning and effect, as noted previously, of the Grain Standards Act, the regulations adopted thereunder, and the less official "grain instructions" promulgated by the Department of Agriculture.

Section 2 of the Grain Standards Act (7 U.S.C. § 74) specifically makes the trading of export grain from the United States a matter of prime national importance, as to which Congress has felt compelled to legislate:

> SEC. 2 "Declaration of policy
>
> Grain is an essential source of the world's total supply of human food and animal feed and is merchandised in interstate and foreign commerce. It is declared to be the policy of the Congress, for the promotion and protection of such commerce in the interests of producers, merchandisers, warehousemen, processors, and consumers of grain, and the general welfare of the people of the United States, to provide for the establishment of official United States standards for grain, to promote the uniform application thereof by official inspection personnel, to provide for an official inspection system for grain, and to regulate the

> weighing and the certification of the weight of grain shipped in interstate or foreign commerce in the manner hereinafter provided; with the objectives that grain may be marketed in an orderly and timely manner and that trading in grain may be facilitated." 7 U.S.C. § 74 (prior to amendment).

It cannot be said, therefore, that a construction of the Act and its implementing regulations, as will be required herein, is of insufficient magnitude to warrant judicial scrutiny. Indeed, considering the unequivocal statutory intention, petitioners submit that such questions of construction and effect should not be dealt with in arbitration, at all. There is a clear distinction between those types of disputes typically arbitrated under the N.A.E.G.A. 2 contract, such as vessel nomination, cancellation, value of delivery, etc., and the issues which will be critical to a resolution of the disputes herein.

A specific matter under dispute is the Department of Agriculture's implementation of the statutory (7 U.S.C. § 77) and, indeed, regulatory (7 C.F.R. § 26.110) dictate that export grain be certificated based upon samples taken after final elevation as the grain is being loaded aboard the export vessel. USDA has approved sampling, however, which occurs up to ¼ mile from the delivery spout, resulting in a situation where the grain which is sampled (here, dry, brittle corn) may degrade in quality and condition due to subsequent handling during the loading process. In the present cases, where petitioners refused delivery because respondents declined to permit sampling at the spout, as required by law, the issue posed by the regulations and the USDA procedures are ripe for judicial consideration.

As to the "certificate final" clause, which petitioners maintain is void, unconscionable, and otherwise ineffective to bar proposed claims of unmerchantability and the like, petitioners analogize their situations to that of the patent

licensee in *Lear* v. *Adkins, supra,* whose contract with the patentee prohibited him from questioning the validity of the patent. This Court noted not only the great public interest in resolving questions of patent validity, but also noted that the character of the patent itself requires that the concept of "licensee's estoppel" be dispensed with:

> "Consequently, it does not seem to us to be unfair to require a patentee to defend the patent office's judgment when his licensee places the question in issue, especially since the licensor's case is buttressed by the presumption of validity which attaches to his patent. Thus, although licensee's estoppel may be consistent with the letter of contractual doctrine, we cannot say that it is compelled by the spirit of contract law, which seeks to balance the claims of promisor and promisee in accord with the requirements of good faith."

No less a situation obtains in the case of grain certificates. Indeed, they are quite similar to a patent, in that they are issued under governmental authority, represent a legal conclusion which may be the subject of error, are issued on the basis of *ex parte* applications by the exporter, and bear the presumption of validity. To say, however, that a grain inspection certificate is not strictly the same as the patent, is merely to beg the question; the true issue is whether such a certificate (which bears merely a presumption of validity, by statute [7 U.S.C. § 79 (d)] and not, as per N.A.E.G.A. 2, a conclusive presumption of validity) is sufficiently similar to a patent, and enjoys a similar measure of public interest, to preclude arbitration where the effect of the certificate is critical. Petitioners believe that such an analysis would lead to recognition of the fact that arbitration of claims which depend upon the validity of the "certificate final" clause of the N.A.E.G.A. 2 contract would be inappropriate.

POINT II

A writ or writs should issue so that the Court may further elucidate and settle the standards for the disqualification of both arbitrators and arbitration panels.

The last, and indeed the only expression of this court on the issue of the competency and qualifications of arbitrators is *Commonwealth Coatings Corp.* v. *Continental Casualty Co.,* 390 U.S. 145 (1968). In that case, this Court stated that:

> "Any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid the appearance of bias.'

Clearly, the Court's holding in that case was motivated by a strong desire to insure that arbitration, no less than litigation, afford a fair and impartial alternate forum for the settlement of disputes. A similar concern for fairness and propriety is evident, as well, in other relevant areas. For example, Article 9 of the Draft UNCITRAL Arbitration Rules (1976 Yearbook of the United Nations Commission on Trade Law, Vol. VII, pages 160-166 [U.N. Doc. A/CN. 9/112]), entitled "Challenge of Arbitrators," states:

> '1. Either party may challenge an arbitrator, including a sole arbitrator or a presiding arbitrator, irrespective of whether such arbitrator was:
>
> Originally proposed or appointed by him, or
>
> Appointed by the other party or an appointing authority, or
>
> Chosen by both parties or by the other arbitrators,
>
> *if circumstances exist that give rise to justifiable*

doubts as to the arbitrator's impartiality or independence.' Id. at 162 (emphasis supplied)

The Draft Rules go on to give a specification of circumstances which would "give rise to justifiable doubts as to the arbitrator's impartiality or independence;" however, as the commentary to the Rules makes clear (*id.*, at 170), that list is not exhaustive. The commentary further notes, echoing the concern of *Commonwealth Coatings*, "proof of the existence of a circumstance would disqualify an arbitor, even though no doubt existed as to the impartiality and independence of the arbitrators concerned."

The present case presents an issue not strictly within the scope of the court's opinion in *Commonwealth Coatings*, but of equal urgency, particularly in view of the recent great expansion in the use of arbitration as a means of settling commercial disputes: *viz.*, whether a designated panel from which arbitrators to hear disputes in a particular industry are to be drawn may be disqualified prior to the holding of hearings at the instance of an aggrieved party, much as a jury panel may be challenged (*cf.*, 28 U.S.C. § 1867). A collateral and related issue in these cases is whether, once the identities and affiliations of each of the members of the panel are known, a potential arbitrant may apply in court to have the individuals disqualified from hearing the dispute upon a showing of cause.

The relevant facts in this case are not greatly in dispute: Petitioners signed contracts containing a broad arbitration clause referring the settlement of disputes to arbitration under the Grain Arbitration Rules in the American Arbitration Association. The Rules themselves (App. F) indicate that the "panel" (from which the three arbitrators to hear the dispute are to be drawn) shall be composed of "persons actively engaged in, or retired from active engagement in the grain trade business." In point of fact, despite this description, which on its face indicates a broad membership on the panel composed of persons with highly varied interests in the trade (such as exporters, importers, attorneys, accountants, brokers, agents, and the like), the actual list of the members of the panel may be analytically described as follows: Of the twelve members thereof, seven are presently or formerly employed by the five major U.S. grain exporters, three are grain brokers dependent for their commercial success upon the continued confidence of those exporters, and two are importers or importer representatives. In short, the panel is dominated by the exporters' interests; in the present cases, therefore, where arguments will be made by petitioners which go to the heart of the exporters' preferred method of operation, petitioners, as importers, are relegated to having their arguments reviewed by the very people in whose interest it is to deny them.

Petitioners' position in these cases is not simply that the arbitrators as individuals have a bias against their positions and are therefore not competent to consider these disputes, but more fundamentally, that the panel *per se* has been improperly constituted and violates the principle expressed by this Court in *Commonwealth Coatings*.

It would appear to be no accident that ten of the twelve members of the grain arbitration panel have their allegiances, if not their actual commercial affiliations, with exporters. As Section 3 of the Grain Arbitration Rules makes it clear, the North American Grain Association, which is composed of primarily the major U.S. companies, has virtually the last word on appointments to the panel. Indeed, when the panel was established in 1973, the original members of the panel were all sponsored jointly by Cargill Incorporated and Continental Grain Co., parent corpora-

tions of two of the present respondents and the two largest U.S. grain companies.*

At least two questions seem to have been left open by the decision in *Commonwealth Coatings*: (1) whether a court operating under the United States Arbitration Act may disqualify an arbitrator or a panel of arbitrators and substitute a new arbitrator or panel, pursuant to 9 U.S.C. § 5, prior to the holding of hearings in the arbitration, and (2) whether, indeed, the court has the power to disqualify an entire panel at any time.

There have been cases dealing with the first question, at least as regards individual arbitrators, where disqualification preceded the holding of hearings. *Erving* v. *Virginia Squires Basketball Club*, 468 F. 2d 1064 (2nd Cir. 1972); *Matter of Astoria Medical Group* [*H.I.P.*], 11 N.Y. 2d 128, 132, 227 N.Y.S. 2d 401, 403 (1962) [state law]; *cf. Hawaii Teamsters & Allied Workers, Local 996* v. *Honolulu Rapid Transit Co. Ltd.*, 343 F. Supp. 419 (D. Hawaii 1972) [dictum]. It still remains for this court to give a definitive answer to the question whether, by virtue of the vacatur provisions of Section 10 of the Arbitration Act (9 U.S.C. § 10), an arbitrant or a potential arbitrant is precluded from questioning the qualifications of the arbitrators, not to mention the panel, at any time prior to the rendition of an award. In any event, even if such a position were conceded to be correct, it would still have no application to situations where an arbitration panel, as opposed to the designated individual arbitrators, could or should be disqualified, since different considerations would obtain.*

* It is worth noting that prior to the establishment of the panel in 1973, grain arbitrations had been conducted before the New York Produce Exchange, which maintained two panels. One, the general panel, heard primarily disputes which would involve issues such as these, and was composed of a truly broad spectrum of persons with interests in the foodstuffs and commodities industries. A second, grain panel, was also available to those parties which had a technical grain dispute and which desired that it be resolved by persons with a specific expertise in the execution of export grain contracts. As a result of the transfer of the functions to the American Arbitration Association, only the second, specialized panel is still operational.

As to the second question, no reported cases have been found directly on point, a fact which would indicate the need for clarification by this Court. *See*, however, *Erving* v. *Virginia Squires Basketball Club, supra,* and *Western Union Telegraph Co.* v. *Selby,* 62 N.Y.S. 2d 411; *aff'd without op.* 270 App. Div. 389, 61 N.Y.S. 2d 611, *aff'd* 295 N.Y. 395 (1946), which, by analogy, may be authority for the proposition that an arbitration panel is subject to disqualification, at least where the panel consists of a single individual.

These questions turn upon a construction of the United States Arbitration Act. When the extremely wide application of the Act is considered, as well as the distinct possibility of a recurrence of these questions in future litigation, it would be beneficial and appropriate for the Court to take jurisdiction of these cases in order to settle definitively the foregoing issues.

CONCLUSION

For the reasons hereinabove set forth, the writ or writs prayed for herein should issue.

Respectfully submitted,

David A. Botwinik
Counsel for Petitioners

* For example, it might be difficult to show a causal nexus between an arbitration award and a bias or imbalance in the panel from which the arbitrators are drawn. This is somewhat akin to the problem which a litigant faces when he has reason to believe that a jury panel has been improperly constituted, a problem which has been alleviated by the enactment of 28 U.S.C. § 1867.

APPENDIX A

Opinion of Supreme Court of the State of New York, New York County.

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

INDEX NO. 18935/75

In the Matter of the Application of:

R. PAGNAN & F. LLI for an order compelling the consolidation of the following two (2) arbitration proceedings:

R. PAGNAN & F. LLI (Arbitration Respondent)

Petitioner,

and

LOUIS DREYFUS CORPORATION (Arbitration Claimant) and
THE AMERICAN ARBITRATION ASSOCIATION,

Respondents.

WITH

R. PAGNAN & F. LLI (Arbitration Claimant)

Petitioner,

and

FRIBESCO S.A. (Arbitration Respondent) and
THE AMERICAN ARBITRATION ASSOCIATION,

Respondents.

STECHER, J.:

Petitioner moves for an order directing arbitration and consolidating the two proceedings in which arbitration has

been demanded before the American Arbitration Association. Respondent Fribesco S.A. cross-moves for an order staying arbitration.

Petitioner and respondents Louis Dreyfus Corp. and Fribesco S.A. are grain traders. Petitioner agreed to purchase from Dreyfus and sell to Fribesco 25,000 long tons of #3 Yellow corn, F.O.B. buyer's vessel for delivery in May 1975. Fribesco, as buyer, advised Pagnan to load the corn aboard the S.S. Mosgulf. A dispute arose between Dreyfus and Fribesco concerning Fribesco's right to have the corn sampled by a method selected by the buyer. Fribesco refused to accept delivery. Both seller and buyer declared petitioner to be in default for petitioner's failure to take delivery of the grain from Dreyfus or delivered to Fribesco. Dreyfus, seeking over $500,000 in damages from petitioner, has demanded arbitration. Petitioner, in turn seeks damages of $540,000 from Fribesco and it, likewise, had demanded arbitration. Fribesco resists arbitration as well as consolidation on two grounds: (1) that the matter in dispute involves a public policy question not subject to arbitration; and (2) that the arbitration panel is biased.

Fribesco does not seriously contest that there is a valid arbitration agreement between itself and petitioner. Rather, the thrust of its argument is that the dispute involves a public policy question. The argument is without merit. Whether the principles underlying the United States grain standards Act (7 U.S.C. § 71, et seq.) are being carried out by the Department of Agriculture is not an issue before this Court. Here, there is a straight forward contract of sale containing a broad arbitration provision. Petitioner seeks to invoke that clause and is entitled to do so.

> "It is immaterial that the buyer . . . contends that the failure to perform properly also entails a violation of law. Otherwise, it would be a rare arbitration agreement that could not be nullified merely by the contention of illegality in performance . . . It suffices that the agreement was lawful and called for lawful performance, . . ." In re, National Equipment Rental, Ltd. (American Pecco Corp.) 28 N Y 2d 639, 641.

Here, there is no public policy question involved which could cause this court to modify a contract arrived at by arms length bargaining between experienced parties represented by able counsel. If Fribesco desired to provide for a different method of sampling the corn it should have so provided in its contract with petitioner. It failed to do so and cannot now invoke the aid of the court to modify a lawful contract.

Fribesco's second objecion is directed to the alleged bias of the arbitration panel. The arbitration is governed by the grain arbitration rules of the American Arbitration Association. The panel from which the arbitrators are to be selected is composed of employees of the major grain traders and brokers in the grain trade, for the obvious purpose of providing expertise in a highly specialized field. It is Fribesco's argument that practically every member of the panel would be subject to challenge because of the substantial business dealings engaged in between the employers of the panel members and parties adverse to this proceeding. To the extent that the attack is on individual panel members, it is at best premature. The rules of the American Arbitration Association (Art. V Sec. 11), which by the parties' contracts govern the resolution of their disputes, provide for a disclosure and challenge procedure. To the extent that it is the panel itself which is challenged, the challenge is to a provision of the parties' own contracts with which the court will not at this stage interfere (cf. CPLR 7511(b)(1) (ii)). They have made their contract and the court will enforce it (Matter of Astoria Medical Group v. Health Ins. Co., 11 N Y 2d 128).

Appendix A.

The cases relied on by Fribesco do not sustain its position. Commonwealth Coating Corp. v. Continental Casualty Co. (393 U.S. 145), holds that where a "neutral" arbitrator has failed to disclose substantial business dealings with one of the parties an arbitration award must be vacated. This is obviously not the case here. All the parties and members of the arbitration panel are involved in the grain trade, an industry made up of a small number of companies. The Court of Appeals for the Second Circuit has held that dealings in the ordinary course of business between an arbitrator and parties to the arbitration will not disqualify an arbitrator, where, as here,

> ". . . the parties have agreed to arbitration with full awareness that there will have been certain, almost necessary, dealings between a potential arbitrator and one of the opposing parties . . .".

Garfield & Co. v. Wiest, 432 F 2d 849, 854, cert. denied, 401 U.S. 940, see also, Perl v. General Fire & Casualty Co., 34 A D 2d 748) In Cook Industries, Inc. v. C. Itoh & Co. (America), Inc. (449 F 2d 100 Cert. denied, 405 U.S. 921) a dispute concerning the performance of a contract to sell corn, had proceeded to arbitration. After the arbitrators had ruled in respondent's favor, petitioner sought to vacate the arbitration award urging that there was "evident partiality" within the meaning of 9 USC § 10(b) and Commonwealth Coatings Corp. v. Continental Casualty Co., supra, (Heavily relied on by Fribesco), because Cargill, Inc., the employer of one of the arbitrators had substantial business dealings with respondent, a fact, not disclosed before the arbitration. The U.S. Court of Appeals in upholding the arbitration award, found no extraordinary dealings between respondent and Cargill. As in Cook Industries, so here all the parties were fully aware of the composition of the arbitration panel. Fribesco has failed to show any partiality on

Appendix A.

the part of the arbitration panel. The motion to direct Fribesco S.A. to proceed to arbitration is granted and Fribesco's cross-motion is denied.

That part of the motion seeking consolidation of the two captioned proceedings is also granted. In re Vigo Corp. v. Marship Corp. of Monvoria, (26 N Y 2d 157).

Settle order.

DATED: October 6, 1976.

M. B. S.
J. S. C.

APPENDIX B

Orders of Affirmance of Appellate Division, First Department.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 2, 1977.

Present—Hon. Francis T. Murphy, Jr., Presiding Justice,
Vincent A. Lupiano,
Herbert B. Evans,
Louis J. Capozzoli,
Arthur Markewich, Justices.

375-376N

In the Matter of the Application of Otello Mantovani,

Petitioner-Appellant,

For an Order Staying the Arbitration Sought to be Commenced by

Tradax Overseas, S.A.,

Respondent-Respondent.

Appeals having been taken to this Court by the petitioner-appellant from an order of the Supreme Court, New York County (Stecher, J.), entered on November 8, 1976, granting respondent's motion to quash a subpoena, and from a judgment of said court entered on November 22, 1976, denying the petition and directing the parties to proceed to arbitration, and said appeal having been argued

by Mr. David A. Botwinik of counsel for the appellant, and by Mr. John F. O'Connell of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed on the opinions of Stecher, J., in the companion cases of *Fribesco-Mitsui* and *R. Pagnan & F. LLI.-Finagrain;* and that the judgment so appealed from be and the same is hereby affirmed on the opinion of Stecher, J. in *R. Pagnan & F. LLI.-Finagrain.* Respondent shall recover of appellant $40 costs and disbursements of these appeals.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Appendix B.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 2, 1977.

Present—Hon. Francis T. Murphy, Jr., Presiding Justice,
Vincent A. Lupiano,
Herbert B. Evans,
Louis J. Capozzoli,
Arthur Markewich, Justices.

368-369N

In the Matter of the Application of R. PAGNAN & F.LLI. for an Order Compelling the Consolidation of the Following (2) Arbitration Proceedings

R. PAGNAN & F.LLI. (Arbitration Respondent),

Petitioner-Respondent,

and

LOUIS DREYFUS CORPORATION (Arbitration Claimant) and the AMERICAN ARBITRATION ASSOCIATION,

Respondent-Respondent,

with

R. PAGNAN & F.LLI. (Arbitration Claimant),

Petitioner-Respondent,

and

FRIBESCO S.A. (Arbitration Respondent) and the AMERICAN ARBITRATION ASSOCIATION,

Respondent-Appellant and Respondent-Respondent.

Proceeding No. 3
Index No. 18935/75

Appendix B.

Appeals having been taken to this Court by the appellant Fribesco S.A. from a judgment of the Supreme Court, New York County (Stecher, J.), entered on November 8, 1976, granting petitioner's application for consolidation and for arbitration and denying appellant's cross-motion; and from an order of said court entered on January 3, 1977, resettling the aforesaid judgment,

And said appeals having been argued by Mr. David A. Botwinik, of counsel for the appellant, by Mr. Bennet Hugh Silverman, of counsel for the petitioner-respondent, and by Mr. Francis J. O'Brien, of counsel for respondent Dreyfus; and due deliberation having been had thereon,

It is unanimously ordered that the order entered on January 3, 1977, so appealed from be and the same hereby is affirmed on the opinion of Stecher, J., dated October 6, 1976; and the appeal from the judgment entered on November 8, 1976, be and the same hereby is dismissed as academic. Respondents Pagnan and Dreyfus shall recover of appellant one bill of $40 costs and disbursements of these appeals.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Appendix B.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 2, 1977.

Present—Hon. Francis T. Murphy, Jr., Presiding Justice,
Vincent A. Lupiano,
Herbert B. Evans,
Louis J. Capozzoli,
Arthur Markewich, Justices.

370-372N

In the Matter of the Application of R. PAGNAN & F.LLI for an Order Compelling the Consolidation of the Following Two (2) Arbitration Proceedings

R. PAGNAN & F.LLI. (Arbitration Respondent),
Petitioner-Respondent,

FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE ET FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE ET FINANCIERE S.A. (Arbitration Claimant) and the AMERICAN ARBITRATION ASSOCIATION,
Respondents-Respondents,

with

R. PAGNAN & F.LLI. (Arbitration Claimant),
Petitioner-Respondent,

and

FRIBESCO S.A. (Arbitration Respondent) and the AMERICAN ARBITRATION ASSOCIATION,
Respondent-Appellant and
Respondent-Respondent.

Proceeding No. 2
Index No. 18143/1975

Appendix B.

Appeals having been taken to this Court by the appellant Fribesco, S.A. from an order of the Supreme Court, New York County (Stecher, J.) entered on October 8, 1976, granting respondent Finagrain's motion to quash a subpoena duces tecum; from a judgment of said court entered on November 8, 1976, granting petitioner's application for consolidation and for arbitration and denying appellant's cross-motion; and from an order of said court entered on January 3, 1977, resettling the aforesaid judgment,

And said appeals having been argued by Mr. David A. Botwinik, of counsel for the appellant, by Mr. Sheldon A. Vogel, of counsel for respondent Finagrain, and by Mr. Bennet Hugh Silverman, of counsel for the petitioner-respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order entered on October 8, 1976, so appealed from be and the same hereby is affirmed on the opinion of Stecher, J. and the opinion of Stecher, J. in the companion proceeding of *Fribesco-Mitsui;* the order entered on January 3, 1977, so appealed from be and the same hereby is affirmed on the opinion of Stecher, J., dated October 6, 1976; and the appeal from the judgment entered on November 8, 1976, be and the same hereby is dismissed as academic. Respondents Pagnan and Finagrain shall recover of appellant one bill of $40 costs and disbursements of these appeals.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Appendix B.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 2, 1977.

Present—Hon. FRANCIS T. MURPHY, JR., Presiding Justice,
VINCENT A. LUPIANO,
HERBERT B. EVANS,
LOUIS J. CAPOZZOLI,
ARTHUR MARKEWICH, Justices.

373-374N

In the Matter of the Appication of Fribesco, S.A.,
Petitioner-Appellant,

For an Order Staying the Arbitration
Sought to be Commenced by

Mitsui & Co. (U.S.A.), Inc.,
Respondent-Respondent.

Appeals having been taken to this Court by the petitioner-appellant from a judgment of the Supreme Court, New York County (Stecher, J.), entered on November 9, 1976, denying petitioner's application for a stay of arbitration, and from an order of said court entered on November 9, 1976, granting respondent's motion to quash a subpoena, and said appeal having been argued by Mr. David A. Botwinik of counsel for the appellant, and Mr. Howard F. Ordman of counsel for the respondent; and due deliberation having been had thereon,

Appendix B.

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed on the opinion of Stecher, J., dated October 6, 1976; and the order so appealed from be and the same is hereby affirmed on the opinion of Stecher, J. and on the opinion of Stecher, J. in the companion proceeding of *R. Pagnan & F.LLI.—Finagrain.* Respondent shall recover of appellant one bill of $40 costs and disbursements of these appeals.

ENTER:

JOSEPH J. LUCCHI
Clerk

APPENDIX C

Order of Court of Appeals, State of New York, Denying Motion for Leave to Appeal.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of October A. D. 1977

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

Mo. No. 724

In the Matter of

the Application of Fribesco, S.A.,

Appellant,

For an Order Staying the Arbitration Sought to be Commenced by Mitsui & Co., (U.S.A.), Inc.

Respondent.

& 3 additional proceedings—
Mtr. of R. Pagnan & F.LLI.
(Fribesco S.A., Appellant),
Mtr. of R. Pagnan & F.LLI.
(Fribesco S.A., Appellant),
Mtr. of Otello Mantovani, Appellant—
Tradax Overseas, S.A.

A motion for leave to appeal &c. to the Court of Appeals in the above cause having been heretofore made upon the

part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary printing disbursements.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

APPENDIX D

Statutes and Regulations.

UNITED STATES GRAIN STANDARDS ACT (Title 7, U.S.C., prior to amendment by P.L. 94-582)

SEC. 2 *"Declaration of policy*

Grain is an essential source of the world's total supply of human food and animal feed and is merchandised in interstate and foreign commerce. It is declared to be the policy of the Congress, for the promotion and protection of such commerce in the interests of producers, merchandisers, warehousemen, processors, and consumers of grain, and the general welfare of the people of the United States, to provide for the establishment of official United States standards for grain, to promote the uniform application thereof by official inspection personnel, to provide for an official inspection system for grain, and to regulate the weighing and the certification of the weight of grain shipped in interstate or foreign commerce in the manner hereinafter provided; with the objectives that grain may be marketed in an orderly and timely manner and that trading in grain may be facilitated." 7 U.S.C. § 74

SEC. 5 "Official inspection requirements waiver for certain export grain

Whenever standards are effective under section 4 of this Act for any grain, no person shall ship from the United States to any place outside thereof any lot of such grain that is sold, offered for sale, or consigned for sale by grade, unless such lot is officially inspected in accordance with such standards on the basis of official samples taken after final elevation as the grain is being loaded aboard, or while it is in, the final carrier in which it is to be transported from the United States, and unless a valid official certificate showing the official grade designation of the lot of grain is

promptly furnished by the shipper, or his agent, to the consignee with the bill of lading or other shipping documents covering the shipment; *Provided, however,* That the Secretary may waive any requirement of this section with respect to shipments from or to any area or any other class of shipments when in his judgment it is impracticable to provide official inspection with respect to such shipments." 7 U.S.C. § 77

SEC. 7 "Official inspection authority and funding

(a) The Secretary is authorized to cause official inspection under the standards provided for in section 4 of this Act to be made of all grain required to be officially inspected as provided in section 5 of this Act, in accordance with such regulations as he may prescribe.

• • •

"(d) Certificates issued and not canceled under this Act shall be received by all officers and all courts of the United States as prima facie evidence of the truth of the facts stated therein." 7 U.S.C. § 79(a) and (d)

DEPARTMENT OF AGRICULTURE REGULATIONS
(Title 7, C.F.R.)

§ 26.110 Mandatory inspection—export grain.

(a) *General requirements.* Whenever standards are effective under the Act for any grain, an official inspection for grade must, except as provided in paragraph (g) of this section, be obtained for each lot of such grain which is to be shipped from the United States to any place outside thereof and is sold, offered for sale, or consigned for sale by grade. Inspection is also required as prescribed in § 26.111 for export and other grain if it is in a container which shows an official grade designation or an

official inspection mark; or the grain is represented to have been officially inspected.

(b) *Who must obtain inspection.* The official inspection for official grade of export grain must be obtained by or for the exporter of record, unless a certificate sufficient for purposes of section 5 of the Act has previously been obtained. The conditions under which the grain is offered for inspection must meet the requirements of §§ 26.9 and 26.11. If the grain is inspected at the time of loading, the carrier or stowage space(s) for the grain must be examined by official inspection personnel and found to be clean, dry, and free of insects, other vermin, commercially objectionable foreign odors, and other factors which could contaminate the grain or lower the grade of the grain.

(c) *Scope and basis of inspection.* The inspection for official grade and official factors shall be in accordance with the official grain standards.

(d) *Sampling requirements.* (1) The inspection for official grade and official factor information must be based on official samples obtained from the grain as it is being loaded aboard, or while it is in the final carrier in which it is to be transported from the United States: *Provided,* That the inspection of sacked grain may be based on an initial inspection as the grain is being sacked and a final inspection as the sacks of grain are being loaded aboard the final carrier in which they are to be transported from the United States, in accordance with instructions issued by the Administrator.

(2) The samples must be obtained by official inspection personnel (other than licensed employees of a grain elevator or warehouse).

(3) After May 1, 1976, all bulk export cargo grain officially inspected shall be sampled by means of approved

diverter-type mechanical samplers: *Provided,* That if an export elevator or export loading facility cannot meet the May 1, 1976, deadline for installation and approval of diverter-type mechanical samplers because of necessary construction or other conditions beyond the control of the elevator or facility the Administrator may:

(i) Upon written request by an export elevator or export loading facility for extension of time, review the circumstances of the request and, if warranted, grant an extension based on the circumstances of each request. Such extension shall be based on evidence in the written request that a diligent effort has been made to meet the May 1 deadline; but because of necessary construction or other conditions or circumstances beyond the control of the person or firm making the request, the installation and approval of diverter-type mechanical samplers cannot be achieved by the May 1, 1976, deadline.

(ii) Require in each case where an extension beyond the May 1, 1976, date is granted, that each official inspection certificate issued during such period of extension for a bulk export cargo lot at such export elevator or export loading facility shall contain the statement,

The lot of grain represented by this certificate was sampled by .....
(type of sampling
.....
method)

(iii) Require that if installation and approval of diverter-type mechanical samplers are not achieved by the requesting party during the period of extension beyond the May 1, 1976, date granted by the Administrator, each official inspection certificate issued after the termination of the allowed extension period at the export elevator or export loading facility shall contain the statement,

The lot of grain represented by this certificate was sampled by means of ..... (type of ..... and samples obsampling method)

tained by such method may not be as representative as those obtained by approved diverter-type mechanical samplers.

This statement will also be applicable to official inspection certificates issued for export cargo lots at export elevators or export loading facilities that have not installed approved diverter-type mechanical samplers by May 1, 1976, and are not granted an extension by the Administrator.

(iv) Provide that after installation and approval of diverter-type mechanical samplers at an export elevator or export loading facility, the method of sampling statement shall not be required to be shown on official export inspection certificates issued at that location.

(4) Bulk export cargo grain which is officially inspected shall be sampled as it is being loaded aboard the final carrier. The samples must be obtained as near as practicable to the end of the final loading conveyance, unless otherwise approved by the Administrator under such conditions as he determines will provide representative samples and maintain the integrity of the inspection service: *Provided,* That:

(i) All export elevators or export loading facilities where official inspection of bulk cargo shipments of grain is performed shall be so constructed and operated that no grain or other material may be introduced or added to the stream of grain at any point from diverter-type mechanical samplers to the final carrier, except for those

materials specifically approved by the Administrator under conditions prescribed in the instructions; e.g., the addition of an approved fumigant or pesticide to control insect infestation.

(ii) At export elevators or export loading facilities where diverter-type mechanical samplers are presently installed or located other than near the end of final loading conveyance, the Administrator may, if he determines that any means have been employed to circumvent such diverter-type mechanical samplers that affects the representativeness of samples obtained, require that the samplers be relocated as near as practicable to the end of the final loading conveyance.

(iii) For new export elevators or export loading facilities which begin construction after May 1, 1976, the diverter-type mechanical samplers installed to obtain official samples for inspection shall be installed as near as practicable to the end of the final loading conveyance.

(iv) If an export elevator or export loading facility which is presently operating begins renovation or remodeling after May 1, 1976, and such renovation or remodeling includes the area in which diverter-type samplers are already installed and will affect the sampling system; and if such diverter-type mechanical samplers are not located as near as practicable to the end of the final loading conveyance, the Administrator may, at the time of renovation or remodeling, require the diverter-type mechanical samplers to be relocated as near as practicable to the end of the final loading conveyance.

(v) The Administrator may waive such requirements for (A) classes of shipments of sacked grain which are impracticable to sample with diverter-type mechanical samplers while grain is being loaded aboard or while it is in the final carrier, and (B) emergency situations such as mechanical or power failure.

(5) The term "final loading conveyance" shall be deemed to mean the mechanical equipment, device, or apparatus used to transport or move the grain from the elevator bins or tanks to the spout or device which directly delivers the grain into a container or carrier which will transport the grain from the United States.

(e) *Where to obtain inspection.* A request for an original inspection on export grain shall be filed in accordance with § 26.26; for reinspection in accordance with § 26.36; and for appeal inspection in accordance with § 26.46. Exceptions to the requirements of this paragraph may, upon request of the applicant, be made by the Administrator. (For locations where official inspection services are available, see § 26.9(d).)

(f) *Certification requirements.* Subject to paragraph (g) of this section, only an unsuperseded and unqualified official grain inspection certificate for official grade shall be deemed to meet the requirements of section 5 of the Act. The original of the unsuperseded inspection certificate must be forwarded by the shipper or his agent, to the consignee or to his order with the bill of lading or other shipping documents covering the shipment.

(g) *Exemptions.* (1) The mandatory inspection and certification provisions of paragraphs (a) through (f) of this section are waived with respect to export grain which (i) is not shipped from or through a designated inspection area; or (ii) is in lots of 500 bushels or less, and is located 50 or more miles from the nearest designated inspection point (For locations where official inspection services are available, see § 26.9(d).); or (iii) is shipped from or through a designated inspection area where official inspection is ordinarily obtainable but the applicant for service is notified by the official inspection agency or field office where the application was filed that official inspection per-

sonnel are temporarily not available to perform the required inspection as determined in each specific case by the Administrator: *Provided,* That no exemption under this subparagraph shall be applicable to export grain which is in a container which shows an official grade designation or an official inspection mark, or to grain which is represented to have been officially inspected and is required to be inspected under § 26.111.

(2) The invoice covering each lot which is shipped under any exemption prescribed in subparagraph (1) of this paragraph shall clearly show the statement. "This lot not officially inspected for grade."

United States Arbitration Act (Title 9, U.S.C.)

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A writen provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming

Appendix D.

of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 10. SAME; VACATION; GROUNDS; REHEARING

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

APPENDIX E

Excerpts From Form No. 2 N.A.E.G.A.

Bought of .....

Sold to .....

ON THE CONDITIONS AND RULES INCORPORATED HEREIN

• • •

Commodity

.....

In accordance with the official grain standards of the United States or Canada, whichever applicable, as in effect on contract date.

• • •

Quality

Quality and condition to be final at port/s of loading in accordance with official inspection certificate/s.

• • •

Delivery

Delivery between the dates of ..... and ....., both inclusive, at discharge end of loading spout, to buyer's tonnage in readiness to load, in accordance with custom of the port/s but always subject to elevator tariff/s.

• • •

(SEE CONDITIONS AND RULES ON OTHER SIDE)

Appendix E.

CONDITIONS AND RULES

• • •

3. ARBITRATION. Buyer and seller agree that any controversy or claim arising out of, in connection with or relating to this contract, or the interpretation, performance or breach thereof, shall be settled by arbitration in the City of New York before the American Arbitration Association or its successors, pursuant to the Grain Arbitration Rules of the American Arbitration Association, as the same may be in effect at the time of such arbitration proceeding, which rules are hereby deemed incorporated herein and made a part hereof, and under the laws of the State of New York. The arbitration award shall be final and binding on both parties and judgment upon such arbitration award may be entered in the Supreme Court of the State of New York or any other Court having Jurisdiction thereof. Buyer and seller hereby recognize and expressly consent to the jurisdiction over each of them of the American Arbitration Association or its successors, and of all the Courts in the State of New York. Buyer and seller agree that this contract shall be deemed to have been made in New York State and be deemed to be performed there, any reference herein or elsewhere to the contrary notwithstanding.

• • •

APPENDIX F

Excerpts From American Arbitration Association Grain Arbitration Rules as in Effect November 1, 1973.

AMERICAN ARBITRATION ASSOCIATION

GRAIN ARBITRATION RULES

I. DEFINITIONS

Section 1. As used in these Rules:

(a) The term "AAA" means American Arbitration Association.

(b) The term "the Arbitration Advisory Committee" means the Arbitration Advisory Committee of North American Export Grain Association Incorporated.

(c) The term "these Rules" means the Grain Arbitration Rules of AAA as they exist at the time an arbitration is initiated under them.

(d) The term "Administrator" means AAA or its designated representative.

(e) The term "Panel" means the current list of persons available to serve as arbitrators under these Rules, as is described in Section 3 of these Rules.

II. RULES A PART OF THE ARBITRATION AGREEMENT

Section 2. Whenever parties have entered into a contract that provides for arbitration (a) under the Grain Arbitration Rules of AAA or (b) before the Arbitration Committee of the New York Produce Exchange or of Inter-

national Commercial Exchange, Inc. (or, if mutually agreed upon by the parties at the time arbitration is requested, before the Committee on Grain of the New York Produce Exchange or of International Commercial Exchange, Inc.) or the successors to any or all of the Arbitration Committee, the Committee on Grain of the New York Produce Exchange or International Commercial Exchange, pursuant to the "Grain Arbitration Rules of the New York Produce Exchange", those parties shall conclusively be deemed to have made these Rules and any amendments of them a part of their arbitration agreement.

III. ARBITRATORS

Section 3. The Administrator shall maintain a current list of the names of persons, who are actively engaged in, or have retired from active engagement in, the grain trade business, available to serve as arbitrators under these Rules. The Arbitration Advisory Committee shall, at the request of the Administrator or may, at its discretion, appoint persons to the list. The Administrator may also, at its discretion, appoint persons to the list.

For the hearings of arbitrations under these Rules, any three members of the Panel, chosen as provided in Section 9 of these Rules, shall constitute the Board of Arbitrators.

• • •

V. APPOINTMENT OF ARBITRATORS

Section 8. Qualifications

No person shall serve as an arbitrator in any arbition if he has any financial or personal interest in the result of the arbitration, unless the parties waive such disqualification in writing.

Section 9. Selection of Arbitrators

Arbitrations under these Rules shall be held before three arbitrators who, subject to their availability to serve, as determined by the Administrator, shall be chosen by the Administrator from the Panel in alphabetical order of their surnames, starting with the first name on the list and continuing through to the end. For the next and each following arbitration, arbitrators shall be chosen as provided in the preceding sentence, starting with those eligible on the Panel who have not served on the previous arbitration. The same method of choosing arbitrators shall be repeated from the beginning to the end of the Panel as often as is necessary in order to choose the number of arbitrators required for any given arbitration.

Section 10. Notice to Arbitrators of Appointment

Notice of the appointment of the arbitrators shall be mailed to each of the arbitrators by the Administrator, together with a copy of these Rules, and a signed acceptance of the arbitrator shall be filed prior to the opening of the first hearing.

Section 11. Disclosure and Challenge Procedure

A person appointed as an arbitrator shall disclose to the Administrator any circumstances likely to affect his impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such arbitrator or other source, the Administrator shall communicate such information to the parties, and, if the Administrator deems it appropriate to do so, to the arbitrators. Thereafter, AAA shall determine whether the arbitrator should be disqualified and the Administrator shall inform the parties of the decision of AAA.

Appendix F.

Section 12. Vacancies

If any arbitrator resigns, dies, withdraws, refuses to serve, is disqualified or is unable to perform the duties of his office, the Administrator shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules and, unless the parties agree otherwise, in writing, the matter shall continue to be heard or shall be reheard, as the arbitrators deem to be appropriate, before the remaining arbitrators and the newly designated arbitrator.

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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,

Petitioners,

against

MITSUI & CO., (U.S.A.), INC., FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE S.A., R. PAGNAN & F.LLI, LOUIS DREYFUS CORPORATION and TRADAX OVERSEAS, S.A.,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF FOR RESPONDENT MITSUI & CO. (U.S.A.) INC., IN OPPOSITION

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Respondents.

BRIEF FOR RESPONDENT MITSUI & CO. (U.S.A.), INC. IN OPPOSITION

INTRODUCTION

The petition for writ of certiorari is presented on behalf of two separate petitioners in four separate proceedings, all of which were commenced in the Supreme Court of the State of New York for New York County. This brief is submitted in

opposition to the petition of Fribesco, S.A. ["Fribesco"], which is hereinafter sometimes referred to as the petitioner, on behalf of Mitsui & Co. (U.S.A.), Inc. ["Mitsui"] which is hereinafter sometimes referred to as the respondent.

JURISDICTION

Respondent Mitsui does not agree that this Court has jurisdiction, under 28 U.S.C. 1257(3) at least with respect to petitioner's objection to the panel of arbitrators. It contends, as more particularly set forth later in this brief, that no federal question exists with respect to that matter.

RE-STATEMENT OF THE QUESTIONS PRESENTED

We disagree with the petitioner's view of the questions presented and submit that, properly set forth, they are more simply stated, as follows:

1. Whether any public policy forbids the submission to arbitration of the respondent's claim against petitioner for breach of the contract between them, which expressly provides for arbitration thereof?

2. Assuming that this Court finds it has jurisdiction over this question, which we deny,—should the Court refuse enforcement of the contract method for appointment of arbitrators under the Grain Arbitration Rules of the American Arbitration Association and order advance disqualification of any panel which may be so appointed?

ADDITIONAL STATUTORY, TREATY AND REGULATORY PROVISIONS

UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, ARTICLE II
9 U.S.C. following §201 (printed in Appendix A., p. 1)

DEPARTMENT OF AGRICULTURE REGULATIONS 7 C.F.R. 26.46(e); 26.48(a) and (e); 26.50(a) and (b); 26.110(d) prior to amendment of July 31, 1975; 26.110(d)(3) as amended July 31, 1975. (printed in Appendix A, pp. 2, 3)

NEW YORK CIVIL PRACTICE LAW and RULES §7504 (printed in Appendix A, p. 4)

RE-STATEMENT OF THE CASE

The petitioner's statement requires expansion to outline the specific facts in the dispute between Mitsui and Fribesco.

The contract, dated December 6, 1974, provided for the sale by Mitsui of 25,000 long tons of corn at $157 per 1000 kilos, for delivery into a ship to be provided by Fribesco. In accordance with the contract, Fribesco as buyer nominated the vessel "Sydney Bridge" which arrived, for loading, at the port of New Orleans, on July 29, 1975.

Although, as it claimed in the New York Courts, Fribesco had become concerned in late 1974, about the quality of U.S. corn, it took no steps as permitted by Department of Agriculture regulations, to arrange for inspection of the grain by officials of the Department, and took no other action allowed to it under such regulations, for its protection. Instead, on arrival of the vessel, Fribesco demanded sampling by a method not provided for in the contract, and other than as required by Department of Agriculture regulations, and when such method of sampling was refused by the grain elevator, Fribesco refused to accept delivery and withdrew the ship.

The same vessel then was loaded with grain at another elevator, where the corn was sampled and inspected by the same method which Fribesco had rejected from Mitsui. At the time of such rejection and alternative purchase, the market price of the product had decreased by almost $30 per 1000 kilos, and Fribesco has never disputed Mitsui's contention that it obtained the advantage of that lower price on purchasing the alternative supply.

When Mitsui demanded arbitration of its claim for breach of contract, Fribesco commenced a proceeding, in the New York Courts under New York procedural law [CPLR 7501 et seq] for the stay of arbitration which has been denied by the New York courts.

ARGUMENT

POINT I

PETITIONER HAS NOT SHOWN THAT ANY SUBSTANTIAL FEDERAL QUESTION EXISTS; AND NO PUBLIC POLICY FORBIDS THE ARBITRATION OF THE CONTROVERSY BETWEEN THE PARTIES

Petitioner challenges the arbitrability of the dispute upon two grounds: (1) It asserts that the Grain Standards Act required sampling of the grain "at the spout" while in the process of loading aboard ship, and that sampling by the method required and approved by the Department of Agriculture is unlawful. (2) It asserts that the clause in the contract which provides that the official certificate of inspection shall be final as to quality and condition, is unlawful. Petitioner urges that its contentions require analysis of complex provisions of the statute and of the Department of Agriculture regulations and that arbitrators should not be entrusted with that task.

Fribesco's premises, however, are incorrect. The statute did not, and even after subsequent amendment in 1976 to tighten the inspection procedures, still does not require sampling of the grain "at the spout". It then required merely that inspection be made "on the basis of official samples taken after final elevation as the grain is being loaded" [7 USC §77 prior to 1976 amendment]. The regulation of the Department of Agriculture, issued for implementation of the Act and in accordance with its powers under 7 USC §84 (now §75a) required that "the samples must be obtained after the final vertical elevation, at such place or places in such manner as will

obtain the most representative sample, and otherwise in accordance with the instructions" [7 C.F.R. 26.110 (3), prior to 1976 amendment].

At the time when delivery was to be made, the Department required that wherever an "automatic diverter sampling system" was available at a grain elevator, (as it was in the elevator from which delivery was to be made by Mitsui), no other method of sampling could be used. That system of sampling became mandatory, for all elevators by regulation effective November 1, 1975. [40 F.R. 32948] (App. A, page 3)

Even the 1976 amendments to the Grain Standards Act by Public Law 94-582, which was intended to improve the inspection system, merely required that samples be drawn "as near the final spout . . . as physically practicable", [7 USC 77(a)(1)] and under such amendment, the amended regulation 26.110 (as printed in petitioner's Appendix D, pp. A17-23) still does not require sampling at the spout.

Thus, petitioner's premise that sampling at a place other than the spout is illegal, is without foundation.

Nor is there any illegality in the contract clause which provides that the inspection certificate, to be issued by the Department of Agriculture, shall be final as to quality and condition. The fact that the Act [7 USC 79(d)] makes such a certificate *prima facie* evidence of the truth thereof in court, does not mean that the parties may not agree that, as between themselves, it shall be final. Such a provision is similar to the provision in a construction contract which makes an architect's certificate as to conformity and completion final and binding. Clear and unambiguous agreements to that effect are entirely lawful. *United Pacific Insurance Co.* v. *County of Flathead, et al,* 499 Fed 2d 1235 (C.A. 9, 1974); *Arkin Construction Co., Inc.* v. *Reynolds Metals Company,* 310 Fed 2d 11 (C.A. 5 1962); *Merchantile Trust Company* v. *Hensey,* 205 U.S. 298 (1907).

Petitioner relies heavily upon a number of precedents in which an agreement of arbitration has been denied enforce-

ment on public policy grounds. *Wilko* v. *Swan,* 346 U.S. 427 (1958) held that, since waiver of rights granted by the Securities Act of 1933 is prohibited by the statute, which also provided for a right of action thereunder, an agreement to arbitrate such a claim is contrary to law. *American Safety Equipment Corp.* v. *J. P. Maguire & Co.,* 391 F 2nd 821 (C.A. 2, 1968), held that a contention that the contract between the parties was void under the antitrust laws was not subject to arbitration under the contract, the Court holding that Congress did not intend such issues to be resolved elsewhere than in the Courts. To the same effect is *Helfenbein* v. *International Industria, Inc.,* 438 Fed 2nd 1068 (C.A. 8, 1971). In *Lewis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 431 F. Supp 271 (E.D. Pa, 1977), the Court found that a provision against waiver of rights, similar to that contained in the Securities Act of 1933, should prevail against an agreement to arbitrate. The patent cases upon which petitioner relies, *Lear* v. *Adkins,* 395 US 653 (1969), *Beckman Instruments* v. *Technical Development Corp.,* 433 F. 2nd 55 (C.A. 2, 1970) and *Diematic Mfg. Corp.* v. *Packaging Industries, Inc.,* 381 F Supp 1057 (SDNY 1974) are also of similar import: since patents create monopolies and represent an exception to the antitrust laws, a challenge to their validity involves a determination whether the antitrust laws apply.

In all of these cases, the determination was made on the basis that the constracts contained provisions either themselves unlawful or whose interpretation by arbitrators could result in condonation of unlawful conduct; and in addition the Courts found that the statutes involved provided a remedy by action at law which Congress intended to be exclusive.

No such circumstances are here present. The contract for the sale of grain was lawful, nor did it require Fribesco to waive any statutory rights or any right of legal action provided thereby as a remedy.

As a matter of fact, Fribesco, as a buyer, was granted certain administrative rights under the Department of Agricul-

ture regulations, e.g. the right in advance of original inspection to require appeal inspection by a field office of the Department of Agriculture [7 C.F.R. 26.46(e); 26.48(a)][1] based upon new samples [7 C.F.R. 26.48(e)][1] and to request an appeal inspection by the Board of Appeals of the Department of Agriculture [7 C.F.R 26.50(a)(e)][1]. Nevertheless, Fribesco never availed itself of any such rights.

To the contrary of the decisions upon which petitioner relies is *Scherk* v. *Alberto-Culver,* 417 U.S. 506 (1974) in which this Court disallowed an attempt to evade arbitration on grounds similar to those sustained in *Wilko* v. *Swan, supra.* This Court held that the contract was international in character, as is the contract between Mitsui and Fribesco,[2] and held that the agreement upon an arbitral forum should be enforced. It said at pages 516, 517:

> "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."

In reaching its conclusion this Court found great support from the *United Nations Convention on the Recognition and Enforce-*

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[1] Printed in App. A, page 2.

[2] The contract was for export of grain from the United States to a foreign buyer having no place of business in the United States. All the jurisdictional complications pointed out by the Court in *Scherk* are equally of concern here.

ment of Foreign Arbitral Awards and the statute for enforcement thereof [9 U.S.C. 201, et seq.].

Similarly, the provisions of the Convention (Article II) were held to require denial of a stay of arbitration in *Antco Shipping Co. Ltd.* v. *Sidermar*, 417 F. Supp 207 (S.D.NY 1976), aff'd without written opinion 553 F 2nd 93 (C.A. 2, 1977); and in *Parsons & Whittemore Overseas Co. Inc.* v. *Societe General de L'Industrie du Papier,* 508 F 2nd 969 (C.A. 2, 1974) the Court enforced a foreign arbitration award on the basis of the Convention. In both cases, opposition was based upon "public policy", but the Courts held that the public policy exception to enforcement under the Convention, must be narrowly construed and should be applied "only where enforcement would violate the forum state's most basic notions of morality and justice" and that the fact that "some national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable" (*Parsons & Whittemore, supra*, pp. 974, 975).

Petitioner has wholly failed to demonstrate that "the essence of the obligation or remedy [sought to be enforced in arbitration] is prohibited by any pertinent statute or other declaration of public policy". [*Antco* v. *Sidermar,* supra. p. 215]

POINT II

THIS COURT DOES NOT HAVE JURISDICTION TO GRANT CERTIORARI WITH RESPECT TO THE QUESTION OF THE ARBITRATION PANEL; BUT IN ANY EVENT, THE CONTRACT PROVISION FOR APPOINTMENT OF ARBITRATORS SHOULD NOT BE DISTURBED

A) Absence of Jurisdiction

The proceeding to stay the arbitration demanded by Mitsui was commenced by Fribesco in New York State Supreme Court under Article 75 of the New York Civil Practice Law and Rules which governs proceedings involving arbitration in the New

York courts. At no time prior to the filing of the petition for Writ of Certiorari now before this Court, did petitioner ever contend that the Federal Arbitration Act (9 USC Sections 1 to 14 and particularly, Section 2) applied to this proceeding.

This court's jurisdiction on review of the final judgment of a State Court, by Writ of Certiorari, is limited to rights claimed to arise "under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." (28 USC 1257(3).)

Petitioner asserts that this Court has jurisdiction, with respect to its objection to the panel from which the arbitrators will be drawn, by virtue of Section 2 of the Federal Arbitration Act (9 USC Section 2) because the contract evidences a transaction involving commerce. Petitioner relies upon the determinations in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Matter of Weinrott (Carp)*, 32 N.Y. 2nd 190. (1973) These decisions, however, did not hold that simply because a transaction involved interstate commerce, the Federal Arbitration Act should apply. *Prima Paint* merely held that when a proceeding involving a demand for arbitration under a commercial contract is pending in a federal court, the Federal Arbitration Act and its interpretation by Federal Courts, would apply. This Court held at page 405 of its opinion:

> "The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. See *Bernhardt* v. *Polygraphic Co., supra,* at 202, and concurring opinion, at 208. Rather, the question is whether Congress may prescribe *how federal courts are to conduct themselves* with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative." (emphasis supplied)

Weinrott merely adopted as New York State law, the doctrine announced in *Prima Paint,* that questions of fraud in the

inducement of a contract are for determination by the arbitrators.

Having chosen to litigate this proceeding in the State Courts of New York, under the New York arbitration statutes, petitioner may not now seek a contrary determination from this Court. *Matter of Vigo Corp. (Marship Corp. of Monrovia)*, 26 N.Y. 2nd 157 (1970) cert. den. 400 U.S. 819.

The propriety of the New York State Court decision under the New York State procedural statute, does not raise a federal question under the Federal Arbitration Act.

(B) The Provision for Appointment of the Arbitrators should not be Disturbed

Appendix F of the Petition for Certiorari, (pp. A 27-A 30) contains an excerpt of certain provisions of the Grain Arbitration Rules of the American Arbitration Association.

Adequate provisions have been made under such Rules to insure the appointment of an unbiased panel of arbitrators. The administrator [The American Arbitration Association (or its designated representative) Rule I, §1(d)] is given the discretion to appoint persons to the list of available arbitrators, in addition to those who may be named by the advisory committee of the North American Export Grain Association, (Rule III, §3). No person may serve as an arbitrator if he has any personal or financial interest in the result unless such disqualification is waived by the parties in writing (Rule V §8). Persons appointed as arbitrators must disclose any circumstances likely to affect their impartiality, and information concerning such circumstances received either from the proposed arbitrator or any other source must be disclosed to the parties and a determination must then be made by the administrator as to whether the proposed arbitrator should be disqualified (Rule V, §11). In the event any arbitrator is disqualified, the administrator must declare the office vacant and fill it in the manner provided by the Rules. (Rule V, §12).

Both under New York Law (Civil Practice Law and Rules, §7504) and under the Federal Arbitration Act (9 USC §5), a court is permitted to supersede the procedures for appointment of arbitrators contained in the contract and appoint others only if such method has failed for any reason.

The provision of the present contract for appointment of arbitrators pursuant to the Grain Arbitration Rules has not failed.

Petitioner relies upon *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968). In that case, this court vacated an award made by a panel of arbitrators, the "neutral" member of which was regularly engaged as a consulting engineer by one of the parties to the arbitration, which fact had not been previously disclosed to the other party.

No such circumstance is here present. Petitioner's objection is based merely on its contention that the arbitrators who will eventually be appointed are not likely to agree with petitioner's views of the statutory requirements for inspection of grain.

That is no ground to disqualify the panel or its members for bias.

Petitioner contracted to purchase grain for export from the United States under the contract form of the North American Export Grain Association containing the arbitration clause involved. As an experienced trader in grain, Fribesco necessarily understood that the persons who might be named as arbitrators would be likely to have had multiple dealings in grain with the members of the said Association. In such circumstances, petitioner is without justification in challenging in advance, the panel which may be selected. *Garfield & Co.* v. *Wiest*, 432 F 2d 849 (CA-2 1970); *Cook Industries, Inc.* v. *C. Itoh & Co. (American), Inc.*, 449 F 2d 106 (CA 2 1971) cert. den. 405 U.S. 921; *Matter of Amtorg Trading Corp.*, 277 App. Div. 531, (1950) Aff'd. 304 N.Y. 519 (1952); *Matter of Siegel*, 40 NY 2nd 687 (1976).

As long as no arbitrator to be appointed has any financial interest in the result and is not otherwise personally disqualified, the panel of arbitrators will be within the contemplation of the parties when the contract was made. Petitioner has shown no cause whatsoever to order their advance disqualification.

CONCLUSION

Petitioner has failed to set forth sufficient reasons for the issuance of the writ of certiorari prayed for, and the petition should be denied.

Respectfully submitted,

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APPENDIX A

TREATIES, STATUTES AND REGULATIONS

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ABRITRAL AWARDS

* * * * *

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

DEPARTMENT OF AGRICULTURE REGULATIONS

§26.46 Where and when to request an appeal inspection and information required.

* * * * *

(e) *Advanced notice.* If desired by the applicant, a request for an appeal inspection may be filed in advance of an original inspection or reinspection of any gain.

§26.48 Who shall handle appeal inspections and method and order of performance.

(a) *United States.* An appeal inspection on grain located in the United States shall be conducted by a field office.

* * * * *

(e) *New sample.* Upon request of the applicant, and if practicable, a new sample shall be obtained and examined as a part of an appeal inspection.

§26.50 Appeal Inspection by Board of Appeals and Review.

(a) *Formation of Board.* The Board of Appeals and Review in the Grain Division is responsible for the supervision of the official inspection of grain to maintain uniformity and accuracy of inspection, and to perform appeal inspections in accordance with the Act and regulations. For the purpose of this section the Board of Appeals and Review shall be considered a field office with the entire United States and Canada as its circuit.

(b) *Who may request.* An Appeal inspection by the Board of Appeals and Review may be requested by an applicant from an inspection conducted by a field office.

REGULATION 26.110(d) as it read prior to 7/31/75

"§26.110 Mandatory inspection—export grain.

(d) Sampling requirements. (1) The inspection for official grade and official factor information must be based on

official samples obtained from the grain as it is being loaded aboard, or while it is in, the final carrier in which it is to be transported from the United States.

(2) The samples must be obtained by official inspection personnel (other than licensed employees of a grain elevator or warehouse).

(3) If the grain is sampled as it is being loaded aboard the carrier, the sample must be obtained under the final vertical elevation, at such place or places and in such manner as will obtain the most representative sample, and otherwise in accordance with the instructions.

EXCERPT OF REGULATION 26.110(d)(3) AFTER AMENDMENT OF JULY 31, 1975 (40 F.R. 32948)

(3) If the grain is sampled as it is being loaded aboard the carrier, the samples must be obtained after the final vertical elevation, at such place or places, and in such manner as will obtain the most representative sample and otherwise in accordance with the instructions; *Provided,* That after November 1, 1975, all bulk export cargo grain shall be sampled by means of approved diverter-type mechanical samples; *Provided further,* That the Administrator may (i) extend the time to May 1, 1976, in specific cases for an export elevator to complete installation of diverter-type mechanical samplers if the elevator can show that diligent effort has been made to meet the November 1, 1975, deadline; (ii) waive such requirements for (*a*) classes of shipments of sacked grain, which are impracticable to sample with such samplers while the grain is being loaded aboard, or while it is in the final carrier, and (*b*) emergency situations involving mechanical or power failure.

§7504. Court appointment of arbitrator

If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.

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This brief is submitted on behalf of Respondent "FINAGRAIN" Compagnie Commerciale Agricole et Financiere S.A. (hereinafter "FINAGRAIN") in opposition to Petitioners' Petition for Writs of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department.

Opinions Below

The opinion of the Supreme Court of the State of New York, New York County, Special Term, Part I (Stecher, J.), has not been reported. A copy of the opinion is Appendix A to the Petition.

The orders of the Appellate Division, First Department, of the Supreme Court of the State of New York, unanimously affirming the orders of Special Term on the opinion of Stecher, J., are reported at 58 A.D.2d 513-514, 394 N.Y.S. 2d 832-834 (1st Dept. 1977). Copies of said orders are Appendix B to the Petition.

The order of the Court of Appeals of the State of New York denying leave to appeal thereto from the orders of the Appellate Division, First Department, is reported at 42 N.Y.2d 811, —— N.Y.S.2d —— (Ct. of App. 1977). A copy of said order is Appendix C to the Petition.

Jurisdiction

"FINAGRAIN" does not agree that this Court has jurisdiction under 28 U.S.C. § 1257(3). No federal question exists with respect to the first Question Presented, *infra*, unless Special Term was in error. No federal question exists with respect to Petitioners' objection to the Grain Panel of the American Arbitration Association. "FINAGRAIN" sets forth with more particularity its jurisdictional objections under Points I and II, *infra*.

Questions Presented

The questions presented are not correctly stated in the Petition. In fact, simply stated, the questions presented are:

1. Was Special Term correct in asserting that "Whether the principles underlying the United States

grain standards Act (7 U.S.C. § 71, *et seq.*) are being carried out by the Department of Agriculture is not an issue before this Court" (A.2)?

2. Was Special Term correct in dismissing Petitioners' attack on the Grain Panel of the American Arbitration Association and on the individual members of the Panel?

Restatement of the Case

Respondent "FINAGRAIN" sets forth certain salient facts of this case because of inaccuracies and misleading statements in the Petition for Writs of Certiorari.

The case at bar involves a so-called string of grain contracts. "FINAGRAIN" sold to Respondent R. Pagnan & F.lli (hereinafter Pagnan) on January 7, 1975, 25,000 LT of No. 3 Yellow Corn, F.O.B. Buyer's vessel at one safe (U.S. Gulf) port at Seller's option for delivery April 1975. Prior thereto, on or about January 2, 1975, Respondent Pagnan had sold the same commodity, under essentially the same terms and conditions, to Petitioner Fribesco S.A. (hereinafter Fribesco).

On May 7, 1975, Petitioner Fribesco nominated the Vessel MOSGULF to load the Pagnan cargo. ETA in the Gulf was given by Fribesco as May 22, 1975. Shortly after receipt of this advice from Fribesco, Pagnan advised "FINAGRAIN" to load the cargo aboard the MOSGULF, giving "FINAGRAIN" the ETA as above. These sales were back to back, and in fact Pagnan applied the purchase contract with "FINAGRAIN" against the sales contract with Fribesco.

On or about June 10, 1975, a dispute arose between Pagnan, Fribesco, and "FINAGRAIN" involving the right, if any, of Fribesco to have the cargo of corn sampled at the end of the loading spout rather than by means of the mechanical diverter which was the only device sanctioned by the United States Department of Agriculture (hereinafter U.S.D.A.).

Petitioner Fribesco declined to load the MOSGULF or any other vessel with the corn purchased as aforesaid.

Petitioners have from the outset of this litigation endeavored to draw a spurious distinction between "foreign importers of United States grain" and "United States exporters of U.S. grain" (Petition 3). The grain industry in this country and in foreign countries is composed of individuals, partnerships, and corporate entities which trade grain and which act as brokers in the trading of grain. A given lot of American grain may be bought and sold literally dozens of times before it is actually loaded aboard a vessel and ultimately consumed. The grain may even be traded while it is aboard a vessel on the high seas. A buyer of a lot of grain may sell the lot within hours or even minutes of the purchase. While the grain is being loaded aboard a vessel, it may be owned by a so-called foreign importer. This may be seen by the fact that Petitioner Fribesco S.A., describing itself as a foreign importer, refused to accept delivery of a lot of grain from Respondent R. Pagnan & F.lli, which Petitioner also describes as an Italian grain importer. In other words, a so-called importer was buying the grain from another so-called importer.

Petitioners attempt to draw this distinction in an effort to discredit the members of the Grain Panel of the American Arbitration Association as mere puppets of the so-called "five major U.S. grain exporters." The inaccuracy of this distinction between "exporters" and "importers" was recognized by Justice Stecher in describing the Grain Panel as being "composed of employees of the major grain traders and brokers." (A. 3)

As will be discussed more fully under Point II, *infra*, Petitioners have until now taken the position that the members of the Grain Panel of the American Arbitration Association "are men of impeccable honor and honesty."

(Fribesco's Brief in the Appellate Division, p. 28.) Now that Petitioners seek a Writ or Writs of Certiorari, they seem to have forgotten the high esteem in which they have hitherto held the members of the Grain Panel. Petitioners deceptively state that "the original members of the panel were all sponsored jointly by Cargill Incorporated and Continental Grain Co. . . ." (Petition 15). Upon the demise of the New York Produce Exchange, the arbitration function was transferred to its successor, the International Commercial Exchange. When the latter also went out of existence, the American Arbitration Association merely took over the old rules and one of the two panels, together with all of its members. Petitioners' assertion that Cargill and Continental "sponsored" the panel is misleading to say the least.

POINT I

The dispute herein does not fall within the narrow category of issues which, for public policy reasons, are not arbitrable.

The issues presented to this Court are of importance only to the parties to this litigation. Petitioners contend that arbitral resolution of their disputes with Respondents "would have a broad effect upon the system of export grain merchandising in the United States" (Petition 7) and that such arbitral resolution is, therefore, against public policy. This position is untenable for two reasons. First, Petitioners apparently seek to change or vary the policies or procedures of entities which are not parties to these disputes or this litigation, namely the United States, the U.S.D.A., and the North American Export Grain Association (hereinafter "NAEGA"). Second, the issues involved in these disputes are not of a nature requiring judicial rather than arbitral determination.

At the outset, it must be stressed that neither the United States nor the U.S.D.A. is now or has ever been a party to this litigation. By their own admission, Petitioners have shown that the federal government has mandated not only that American grain must be inspected prior to its export but also the methods by which the grain was and is to be inspected. Petitioners do not now contend—nor have they ever contended—that the method of inspection was in violation of the then applicable federal regulations. Their contention is merely that the then applicable methods and procedures, as promulgated by the U.S.D.A., did not adequately reflect the intent of Congress as set forth in the United States Grain Standards Act. In short, Petitioners are demanding that private contracting parties defend regulations and procedures in which they had no hand in creating and over which they exercise no power of change. The obvious question arises: Why have Petitioners failed to seek relief against the United States or the U.S.D.A.?

All of the litigation involving these disputes has from its inception been prosecuted in the Supreme Court and the Court of Appeals of the State of New York under the provisions of the New York Civil Practice Law and Rules (hereinafter CPLR) involving arbitration of disputes (CPLR §§ 7501-7514). Now the Petitioners seek a writ or writs of certiorari to this Court, they aver that "the contracts in question 'evidence [sic] . . . transaction[s] involving commerce' within the meaning of the federal Arbitration Act (9 U.S.C. § 2)" (Petition 6, footnote). It is submitted that Petitioners' averring that this dispute falls within the ambit of Title 9 of the United States Code is a tacit admission that this Petition also falls within the ambit of the case of *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) (hereinafter *Alberto-Culver*), which case will be more fully discussed below.

In the case at bar, the contracts were for the sale and purchase of grain. The federal government, in turn, has mandated methods and procedures which must be followed in the execution of such contracts for the sale of American grain abroad. Respondent "FINAGRAIN" merely demanded that Petitioner Fribesco honor its contractual obligations and that the execution of the duties and obligations of the parties be carried out in a legal fashion in accordance with the then applicable regulations and procedures promulgated by the federal government. It cannot be said that either the agreement for the sale or purchase of grain or the agreement to arbitrate contained within or made a part of the principal agreement is illegal. The contract is fully enforceable. As was pointed out by Justice Stecher on the second page of his memorandum, "Fribesco does not seriously contest that there is a valid arbitration agreement between itself and petitioner." (A. 2)

This Court's decisions are legion in support of Respondents' position that the contracts under consideration are altogether enforceable. This is especially so with regard to trade and commerce in world markets. In the *Alberto-Culver* case, *supra,* Alberto-Culver purchased three enterprises owned by Scherk and organized under the laws of Germany and Lichtenstein, together with all trademark rights of these enterprises. The contract of sale contained a number of express warranties whereby Scherk guaranteed the sole and unencumbered ownership of these trademarks and an arbitration clause providing for arbitration before the International Chamber of Commerce in Paris.

Nearly one year after the closing of the transaction, Alberto-Culver allegedly discovered that the trademarks were subject to substantial encumbrances. Alberto-Culver thereupon tendered back to Scherk the property and offered to rescind the contract, which offer Scherk refused. Alberto-Culver then commenced an action in U.S. District Court in Illinois for damages and other relief, contending that Scherk's fraudulent representations concerning the

status of the trademark rights constituted violations of § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. § 78(b), and Rule 10b-5 promulgated thereunder, 17 CFR § 240.10b-5.

Scherk filed a motion to dismiss the action for want of personal and subject matter jurisdiction and on the basis of *forum non conveniens* or, alternatively, to stay the action pending arbitration in Paris pursuant to the agreement of the parties. The District Court denied Scherk's motion to dismiss and granted a preliminary order enjoining Scherk from proceeding with arbitration. The Court of Appeals for the Seventh Circuit affirmed, 484 F.2d 611, upon what it considered the controlling authority of *Wilko* v. *Swan*, 346 U.S. 427 (1953) (hereinafter *Wilko*).

This Court held that the *Wilko* decision did not apply. The Court found "crucial differences" between the agreement involved in *Wilko* and the one signed by Scherk and Alberto-Culver. *Wilko* involved the laws of the United States generally and the federal securities law in particular. The Alberto-Culver dispute, on the other hand, was truly international and involved contracts with numerous foreign countries. (Cf. Restatement, Second, Conflict of Laws § 188(2).)

This Court stated:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

417 U.S. 506, 516 (Footnote omitted).

The language of the *Alberto-Culver* decision is very much in point in the case at bar. "Orderliness and predictability" in the grain trade is patently a goal which the grain trade has sought to achieve by adopting standard contract forms such as the NAEGA 2 contract. Contracts for the sale of grain are highly specialized and are frequently linked together in so-called "strings." Each party in the string relies on the provisions of the form contract to define its rights and obligations.

In the case of *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (hereinafter *The Bremen*), this Court held that a "forum clause should control absent a strong showing that it should be set aside." 407 U.S. 1, 13. It noted that:

> . . . much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place [where personal or *in rem* jurisdiction might be established]. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.

407 U.S. 1, 13-14.

The *Alberto-Culver* decision is dispositive of this issue raised by the Petition. This Court's language is fully applicable to the dispute between the parties in this matter:

> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would as well reflect a "parochial concept that all disputes must be resolved under

> our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." [Citing *The Bremen,* 407 U.S. 1, 9]

416 U.S. 506, 519.

The *Wilko* case, *supra,* upon which Petitioners rely, involved an action by petitioner, a customer, against respondents, partners in a securities brokerage firm, to recover damages under the Securities Act of 1933. Respondents' motion to stay the action pending arbitration pursuant to § 3 of the United States Arbitration Act was denied by the District Court. The Court of Appeals reversed. This Court reversed.

The Court considered two policies of Congress: the desire to secure prompt, economical, and adequate resolution of controversies through arbitration on the one hand and the need to protect the rights of investors on the other hand. The court held that the protective provisions of the Securities Act require the exercise of judiical direction fairly to assure their effectiveness.

Much of the reasoning of this Court stressed "that the purpose of Congress was to assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act." (346 U.S. 427, 432)

This concept of protecting economically weaker buyers does not apply to the case at bar. It reflects merely an attempt by a buyer of a grain contract to avoid the impact of a falling market which made its performance of the contract economically disastrous.

As grain dealers, both as sellers and buyers, Petitioners knew the provisions of standard grain contracts and could have used other forms which would have provided for inspection and sampling at destination or arbitration other

than before the Grain Panel of the American Arbitration Association. They did not elect to do so. The NAEGA 2 contract was used, and its provision for arbitration was knowingly selected by Petitioners, established and knowledgeable grain traders which have used this form on many prior occasions when they were sellers as well as buyers. It is submitted that Petitioners' present position is motivated only by economic considerations. Furthermore, the *Wilko* decision has been essentially reversed with regard to trade and commerce in world markets. The *Alberto-Culver* case is now the law in instances involving international commerce and arbitration agreements.

Petitioners also rely upon the case of *Lear, Inc.* v. *Adkins,* 395 U.S. 653 (1969) (hereinafter *Lear*). Petitioners state that certificates of grain inspection "represent a legal conclusion which may be the subject of error . . . ." (Petition 12) This is simply not a correct statement. A grain inspection certificate is at most a factual conclusion, with certain legal consequences. It may more properly be said to be a document setting forth several characteristics of a given lot of grain, such as its colour, kernel size, water content, etc. The *Lear* case simply could not be less in point.

Petitioners have furnished no authority to support their position that the contract provisions making the U.S.D.A.'s inspection binding on all parties as to quality and condition is against public policy. Further, they assert that the determination of this issue should be left to the Court and not to arbitrators who allegedly have a vested interest in preserving this clause even though Petitioners are buyers as well as sellers in transactions to which this clause applies.

It would be to state the obvious to say that Respondent "FINAGRAIN" is aware of no theory or authority to the effect that a buyer and seller of merchandise cannot agree that a certificate issued under the aegis of the Department

of Agriculture will be binding on the parties, without violating public policy.

Petitioners' position seems to be that they were justified in their anticipatory breach of contract because the inspection certificates could have misrepresented the quality of the grain. None of the parties to the contract, however, had any power to change these inspection methods. Petitioners have refused and continue to refuse to challenge directly the regulations and procedures of the U.S. Department of Agriculture. This Court is an altogether improper forum for Petitioners to use in order to circumvent the established procedures of the U.S.D.A.

In the case of *Elbow Lake Cooperative Grain Company* v. *Commodity Credit Corporation,* 144 F.Supp. 54 (D. Minn., 6th Div. 1956), *aff'd* 251 F.2d 633 (8th Cir. 1958), plaintiffs, grain warehousemen, objected to the method of sampling used to grade defendant's flaxseed. The court refused to allow plaintiffs to make a collateral attack on federal grain inspection certificates. The plaintiffs sought to prove the invalidity of the certificates as a necessary step in proving an alleged breach of Grain Storage Agreements entered into between the parties. The court totally disallowed any such collateral attack because it found that plaintiffs had "failed to exhaust their administrative remedies." 144 F.Supp. 54, 61.

The *Elbow Lake* case is cited with approval in the more recent case of *Farmers Elevator Mutual Insurance Company* v. *Stanford,* 280 F.Supp. 523 (N.D. Tex. 1967), *aff'd Millers Mutual Fire Insurance Company of Texas* v. *Farmers Elevator Mutual Insurance Company,* 408 F.2d 776 (5th Cir. 1969). In this later case, the court again stressed the importance of exhausting administrative remedies and reiterated earlier court decisions holding that failure to exhaust administrative remedies precludes any collateral attack upon grade determination. (See 280 F.Supp. 523, 531.)

In conclusion, Petitioners have cited no case to support their contention that to arbitrate this dispute would in some way circumvent public policy. This Petition should be denied on the precedent of the *Alberto-Culver* and *The Bremen* cases; on the statutory law of New York as set forth in CPLR § 7501 *et seq.,* and on the clear and unambiguous terms and conditions of the contracts between the parties.

POINT II

The Grain Panel of the American Arbitration Association is the appropriate forum for the arbitration of this dispute.

Respondent "FINAGRAIN" submits that this Court does not have jurisdiction to consider Petitioners' attack on the Grain Panel of the American Arbitration Association—a purely procedural attack. As was pointed out under Point I, *supra,* Petitioners have until now litigated these matters under the provisions of Article 75 of the CPLR.* Now that Petitioners seek a writ or writs of certiorari, they invoke the United States Arbitration Act (9 U.S.C. § 1 *et seq.*). However, even the most generous interpretation of the Federal Arbitration Act does not indicate that the entire Grain Panel may be disqualified because of bare assertions of tenuous connections with the parties to this litigation. As was pointed out in the Restatement of the Case, *supra,* many of Petitioners' allegations of fact are simply untrue.

Even if this Court does have jurisdiction to consider Petitioners' attack on the Grain Panel, it is submitted that the attack is totally without merit. Petitioners' argument that the Grain Panel has a vested interest in protecting

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* It is to state the obvious to note that a federal question is not raised under 28 U.S.C.A. 1257(3) by an attack on state court decisions under a state procedural statute

so-called exporters is frivolous. Prior to and during exportation, the ownership of any given lot of grain may pass through numerous grain trading companies, both domestic and foreign. Each company seeks to improve its position by careful observation and expert knowledge of the grain industry and can be both a buyer and a seller in the same string. Few companies can, therefore, be cast solely in the rôle of exporters. As pointed out herein, Petitioner Fribesco, although a so-called importer of grain, is also a seller of grain to the very companies whose personnel sit on the Grain Panel.

The grain trade is not alone in utilizing members of a specific trade to serve as arbitrators of disputes between parties in that trade. The American Arbitration Association maintains a special panel of arbitrators for use by the National Institute of Oil Seed Products S.F.; the American Fats and Oils Associations Inc. of New York utilizes arbitrators selected from a list submitted by the American Arbitration Association. The National Soybean Processors Association utilizes the American Arbitration Association Commercial Rules, but the parties select an arbitrator from a list submitted by the American Arbitration Association consisting of persons knowledgeable in the trade. The textile industry uses a division of the American Arbitration Association known as General Arbitration Counsel of the Textile Industry (GACTI).

In the recent case of *Copen Associates, Inc.* v. *Dan River, Inc.*, 53 A.D.2d 843, 385 N.Y.S.2d 557 (1st Dept. 1976), the Appellate Division addressed a problem precisely like the one in the case at bar. In the *Copen* case, respondent demanded arbitration with the petitioner. Petitioner sought a stay designating five grounds, one of which was the fact that the respondent selected a division of the American Arbitration Association known as General Arbitration Council of the Textile Industry (GACTI) as the tribunal,

which organization is allegedly controlled by large organitions in the textile field, including the respondent. Special Term granted a stay to permit the petitioner to conduct disclosure on the issue of bias and control.

The Appellate Division reversed Special Term and denied the stay. It held:

> . . . one purpose of arbitration is expedition, and the litigation ought not to be protracted. See *Matter of Weinrott (Carp.),* 32 N.Y.2d 190, 199, 344 N.Y.S.2d 848, 856, 298 N.E.2d 42, 47. As an initial matter, GACTI being a division of the American Arbitration Association, the arbitration should go forward. If bias or control should be developed, there is a regular procedure set forth in CPLR § 7511 for raising that question after the determination.

53 A.D.2d 843, 844, 385 N.Y.S.2d 556, 557.

It is submitted that the *Copen* case is dispositive of this issue, Petitioner Fribesco has not only failed to show bias on the part of the members of the Grain Panel, but it has at all times during this protracted and dilatory litigation admitted that "all the members of the Grain Arbitration Panel are men of impeccable honor and honesty. . . ." (See Restatement of the Case, *supra.*) In view of this admission on the part of Petitioner Fribesco and in light of the *Copen* decision by the Appellate Division, it is unthinkable that this arbitration should be stayed because of bare assertions of possible bias on the part of some members of the Grain Panel.

In summation, Petitioner Fribesco agreed, in a free grain market, to arbitrate under the Grain Arbitration Rules of the American Arbitration Association. These rules provide for an expert panel drawn from the grain trade at large. These experts are highly suited to hear and determine these disputes and the Petitioners' contentions. The policy of the New York and federal courts favours such a

panel. Petitioners agreed to arbitrate before a panel which they concede cannot be faulted as far as its honesty and integrity is concerned. The law requires that Petitioners be held to the terms of their unambiguous contract.

CONCLUSION

For the reasons hereinabove set forth, the Petition should be denied.

Respectfully submitted,

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RANDOLPH W. KING, JR.
Of Counsel

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,

Petitioners,

against

MITSUI & CO. (U.S.A.), INC., FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE S.A., R. PAGNAN & F.LLI, LOUIS DREYFUS CORPORATION and TRADAX OVERSEAS, S.A.,

Respondents.

BRIEF OF RESPONDENT LOUIS DREYFUS CORPORATION IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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Introductory Statement

Fribesco, S.A. ("Fribesco"), and Otello Mantovani ("Mantovani"), have petitioned this Court for writs of certiorari to review orders entered on June 2, 1977, by the Appellate Division, First Department of the Supreme Court of the State of New York. The order issued by the Appellate Division affirmed without alteration the opinion, dated October 6, 1976, of the Supreme Court of the State of New York, New York County, Special Term, Part I (Stecher, J.). That opinion was dispositive of four pro-

ceedings, which have since been consolidated for purposes of appeal; Louis Dreyfus Corporation ("Dreyfus"), was a respondent in one of those original proceedings.

An attempt by Fribesco to appeal the ruling of the Appellate Division ended on October 18, 1977, when the Court of Appeals of the State of New York denied leave to appeal. Petitioner now seeks to appeal the ruling of the Appellate Division to this Court pursuant to 28 U.S.C. § 1257(3). For the reasons set forth below, it is the position of Dreyfus that this controversy does not present grounds for this Court's jurisdiction under 28 U.S.C. § 1257(3), and that Fribesco's petition for a Writ of Certiorari to issue from this Court should therefore be denied.

Questions Presented

1. Does the instant controversy among the parties present any overriding issues of public policy which should be resolved in a judicial forum rather than the arbitral forum originally bargained for?

The Court below held "no".

2. Can the Grain Arbitration Rules of the American Arbitration Association be characterized as giving the appearance of bias merely because arbitrators are chosen on the basis of their experience in a particular trade?

The Court below held "no".

3. Did appellant show any potential bias on the part of potential arbitrators which would justify judicial appointment of panel members as opposed to the previously agreed upon method of selection of panel members pursuant to the Grain Arbitration Rules of the American Arbitration Association?

The Court below held "no".

Statutes and Regulations Construed

CPLR 7511(b)(1)(ii)—Civil Practice Law and Rules of the State of New York.

The Facts

The facts surrounding this controversy are simple. On November 19, 1974, Dreyfus, as Seller, and Pagnan, as Buyer, entered into a contract for the sale of 25,000 long tons of No. 3 U.S. yellow corn to be delivered for delivery in May of 1975 at a United States port on the Gulf of Mexico. The contract expressly incorporated by reference the standard North American Grain Association No. 2 Contract ("NAEGA 2"), essentially a Free On Board (F.O.B.) contract in which the Seller, Dreyfus, agreed to deliver the commodity at a U.S. Gulf port to be loaded on a vessel provided by the Buyer, Pagnan.

On that same date, Pagnan, as Seller, and Fribesco, as Buyer, entered into a contract on virtually identical terms, the only difference being the sale price. Both of the above contracts contained identical provisions relating to the quality of the commodity and the method of resolving disputes. Regarding quality, both contracts stated as follows:

> ". . . Quality and condition final at loading as per Official Inspection Certificate."

Official Inspection Certificates for commodities such as the one here are issued under authority of the Department of Agriculture pursuant to the United States Grain Standards Act, 7 U.S.C. § 71 et seq.

Since both contracts incorporated the NAEGA 2 contract by reference, they also included the NAEGA 2 provision which calls for resolution of disputes through arbitration ". . . in the City of New York before the

American Arbitration Association . . . pursuant to the Grain Arbitration Rules . . .". The parties further recognized that the laws of the State of New York would govern the interpretation of the contract, and consented to the jurisdiction of the New York courts.

At Fribesco's direction, the MOSGULF steamed into Destrehan, Louisiana on July 10, 1975, allegedly prepared to load the cargo under the contract. On that date, Dreyfus was prepared to fulfill its obligations, having purchased 25,000 tons of corn from Archer Daniels Midland (ADM), another grain company.

Arriving at Destrehan coincidentally with the MOSGULF were a Mr. Sanchez and a Mr. Kelleher. At that time, Mr. Sanchez was managing director of Sosimage (Fribesco's purchaser and believed to be a parent company or alter ego of Fribesco); Mr. Kelleher was an attorney associated with the law firm currently representing Fribesco in this dispute. Why Fribesco thought it necessary to have an attorney accompany a vessel supposedly intent on fulfilling its contract is a question which Fribesco can best answer.

When the MOSGULF arrived at the St. Charles Elevator, where it was to pick up the subject cargo, representatives of Fribesco demanded that the corn be sampled and inspected at the loading spout. In reply to that request, ADM, which operated the St. Charles Elevator, explained that the Official Inspection point approved by the Department of Agriculture for that elevator was in the "head house", not the loading spout, and consequently stated that if the vessel were to be loaded, the officially sanctioned inspection and sampling method would have to be used.

Disingenuously, Fribesco claimed that this inability to inspect at the spout expressly breached the contract provisions relating to inspection, and refused to allow the

MOSGULF to be loaded. On August 26, 1975, Dreyfus demanded arbitration with Pagnan, pursuant to their contract, for alleged breach, i.e. Fribesco's failure to take delivery of the contract quantity for Pagnan's account. In turn, on September 2, 1975, Pagnan demanded arbitration with appellant Fribesco, pursuant to their contract, for the selfsame failure to take delivery.

On September 22, 1975, Fribesco sent a reply to Pagnan denying the arbitrability of the dispute; it sent a similar reply to Dreyfus on September 30, 1975. Rather than live up to its previous agreement to arbitrate disputes, Fribesco, on November 26, 1975, moved in Supreme Court of New York, County of New York, to stay the duly demanded arbitration.

Fribesco sought to stay the demanded arbitration on two grounds; (1) that the controversy could not be submitted to an arbitration panel since it involved questions of public policy, namely, whether certain Department of Agriculture regulations relating to grain inspection were at variance with the United States Grain Standards Act, 7 U.S.C. § 71 et seq.; and (2) that the arbitration panel should be disqualified prior to the hearing because the Grain Arbitration Rules of the American Arbitration Association somehow contain an institutional bias against parties such as Fribesco.

The trial court disposed of the public policy argument of Fribesco in short order, as can be seen from the following language in the court's opinion (A2):

> "Fribesco does not seriously contest that there is a valid arbitration agreement between itself and petitioner. Rather, the thrust of its argument is that the dispute involves a public policy question. The argument is without merit. Whether the principles underlying the United States grain standards Act (7 U.S.C. § 71, et seq.) are being carried out by the Department of Agriculture is not an issue before this Court. Here,

there is a straight forward contract of sale containing a broad arbitration provision. Petitioner seeks to invoke that clause and is entitled to do so."

Fribesco's arguments as to the alleged partiality of the arbitration panel were likewise rejected by the court, as can be seen from the following:

". . . The panel from which the arbitrators are to be selected is composed of employees of the major grain traders and brokers in the grain trade, for the obvious purpose of providing expertise in a highly specialized field. It is Fribesco's argument that practically every member of the panel would be subject to challenge because of the substantial business dealings engaged in between the employers of the panel members and parties adverse to this proceeding. To the extent that the attack is on individual panel members, it is at best premature. The rules of the American Arbitration Association (Art. V Sec. 11), which by the parties' contracts govern the resolution of their disputes, provide for a disclosure and challenge procedure. To the extent that it is the panel itself which is challenged, the challenge is to a provision of the parties' own contracts with which the court will not at this stage interfere (cf. CPLR 7511(b)(1) (ii)). They have made their contract and the court will enforce it (Matter of Astoria Medical Group v. Health Ins. Co., 11 N.Y. 2d 128)."

The Appellate Division, First Department, affirmed, adopting the language of the trial court's opinion. Its motion for leave to appeal to the Court of Appeals of the State of New York having been denied, Fribesco now seeks to have this Court review the decision of the Appellate Division. For the reasons set forth below, we respectfully submit that this Court does not have jurisdiction to review the ruling of the Appellate Division, and that Fribesco's petition for a Writ of Certiorari should consequently be denied.

ARGUMENT

28 U.S.C. § 1257(3) does not give this Court jurisdiction to review this controversy.

In its petition for a Writ of Certiorari, Fribesco has cited 28 U.S.C. § 1257(3) as the basis for the jurisdiction of this Court. That statute refers to review by this Court of decisions of the highest State courts, and reads in relevant part as follows:

"§ 1257. *State courts; appeal; certiorari*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

Thus, it is apparent that a Federal question is a prerequisite to this Court's jurisdiction, whether that question is raised in connection with a Federal or State enactment.

This principle has long been upheld by this Court. For example, in *Durley* v. *Mayo,* 351 U.S. 277, 100 L.Ed. 1178, 76 S. Ct. 806, rehearing denied, 352 U.S. 859, 1 L. Ed. 2d 69, 77 S. Ct. 22 (1956), this Court stated:

"It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the

> State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U.S. 14, 18, 57 S.Ct. 350, 352, 81 L.Ed. 476; Lynch v. [People of] New York [ex rel. Pierson], 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. Klinger v. [State of] Missouri, 13 Wall. 257, 263, 20 L.Ed. 635; [Walter A.] Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293, 297, 11 S.Ct. 528, 530, 35 L.Ed. 193; Allen v. Arguimbau, 198 U.S. 149, 154-155, 25 S.Ct. 622, 624, 49 L.Ed. 990; Lynch v. [People of] New York [ex rel. Pierson], supra." —76 S.Ct. at 809.

Moreover, ". . . where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Stembridge* v. *State of Georgia*, 343 U.S. 541, 547, 72 S.Ct. 834, 837, 96 L.Ed. 1130 (1952). Even a cursory examination of the court's opinion below shows that this matter was decided purely on the basis of New York State law.

The trial court soundly rejected Fribesco's frivolous attempt to bring the United States Grain Standards Act, 7 U.S.C. § 71 et seq., within the scope of this simple contract dispute. In rejecting Fribesco's argument, the trial court cited *National Equipment Rental Ltd.* v. *American Pecco Corp.*, 35 A.D. 2d 132, 314 N.Y.S. 2d 838, aff'd 28 N.Y. 2d 639, 320 N.Y.S. 2d 248, 269 N.E. 2d 37 (1970), in which the court stated:

> "It is immaterial that the buyer . . . contends that the failure to perform properly also entails a violation of law. Otherwise, it would be a rare arbitration agreement that could not be nullified merely by the contention of illegality in performance . . . It suffices that the agreement was lawful and called for lawful performance . . ."

Thus, the trial court applied New York law in ordering Fribesco to proceed to arbitration in New York, and no Federal question was either raised or resolved by the Court. Turning to the Grain Act itself, there is no language in that Act allowing the assertion of an exclusive cause of action for breach of a sales contract because of a violation of any of its provisions as to sampling. Conversely, there is no granted remedy whereby a buyer would be allowed to assert a claim for damages against his seller because of a violation of its sections as to sampling.

Moreover, if Fribesco were sincerely interested in resolving its contention with the Department of Agriculture, its remedies do not lie within the scope of the contract. First, § 7(c) of the United States Grain Standards Act, 7 U.S.C. § 79(e) states that ". . . the regulations prescribed by the Secretary [of Agriculture] under this Act shall include provisions for reinspections and appeal inspections . . .". Section 26.45 et seq. of the regulations under the Act set forth the procedure for obtaining an appeal inspection. Of course, Fribesco here did not even obtain an initial inspection, much less attempt to obtain an appeal inspection. Rather, it refused delivery on the basis of a hypothetical defect in the regulations, without ever condescending even to examine the commodity itself.

Second, if the case against the validity of the regulation is as damning as Fribesco maintains, it could have brought an action against the Department of Agriculture for an injunction and declaratory judgment pursuant to the Administrative Procedure Act, 5 U.S.C. § 701(a), since they are persons "aggrieved by agency action within the meaning of the relevant statute" as those words are used in 5 U.S.C. § 702. *Barlow* v. *Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L. Ed 2d 192 (1970). The relevant statute, the United

States Grain Standards Act, contains no prohibition against judicial review. Therefore, Fribesco has long had the opportunity to challenge the suspect regulation in court, if it sincerely wished to do so.

Lastly, the recent ruling of the New York Court of Appeals in *Siegel* v. *Lewis,* 40 N.Y. 2d 687, 389 N.Y.S. 2d 800 (1976) buttresses Judge Stecher's finding below that ". . . [t]o the extent the attack is on individual panel members, it is at best premature." Slip opinion at 4. There, a disputed stock purchase agreement contained a clause providing for arbitration by the lawyer and accountant who had actually prepared the agreement between the parties. Petitioner, like the appellant here, sought to disqualify the arbitrators before the commencement of proceedings in view of their previous relationship with both the transaction and the respondent. The Court of Appeals rejected that argument on the grounds that there had been no failure to disclose such interrelationships as existed, and ordered the parties to arbitration:

> "assent by a party to the choice of an arbitrator in the face of that party's knowledge of a relationship between the other side and the arbitrator is a waiver of his right to object. And, '[s]ince waiver is a matter of intention * * * the touchstone * * * is the knowledge, actual or constructive in the complaining party of the tainted relationship or interest of the arbitrator' (*Matter of Milliken Woolens* [*Weber Knit Sportswear*], 11 A.D.2d 166, 168-169, 202 N.Y.S. 2d 431, 434, affd., 9 N.Y. 2d 878, 216 N.Y.S. 2d 696, 175 N.E.2d 826; see, also, Domke, Commercial Arbitration, § 21.04)."
>
> —389 N.Y.S. 2d at 802

In view of its previous NAEGA 2 contracts, the petitioner here is certainly chargeable with at least constructive notice of the Grain Arbitration Rules.

In addition, the *Siegel* court addressed the issue of when is the proper time to challenge the appointment of an arbitrator:

> "Significantly, our statutes, which provide specifically for the enforcement of private arbitration agreements and for the vacatur or modification of awards improperly made, are completely silent on any power to disqualify arbitrators in advance of arbitration proceedings (CPLR art. 75). It is only when an arbitrator cannot act for reasons of health or unavailability or other circumstances tantamount to the occurrence of a vacancy that there is statutory authorization for a court to appoint a replacement" (CPLR 7504).
>
> —389 N.Y.S. at 801

No such allegations were made by petitioner here. Thus, the lower Court was correct in characterizing the application to disqualify as "premature", especially since the CPLR provides adequate forms of protection. As the *Siegel* court observed:

> " 'In the absence of a real possibility that injustice will result, the courts of this State will not rewrite the contract for the parties (see *Matter of Lipschutz* [*Gutwirth*], 304 N.Y. 58, 64, 106 N.E.2d 8)' (50 A.D. 2d 858, 859, 376 N.Y.S.2d 614, 617). Needless to say, if the arbitrators, in the actual execution of their office, prove to have been unfair or unfaithful to their obligations, their award is not impervious to judicial action (CPLR 7506, subd. [a]; 7511, subd. [b]; see *Matter of American Eagle Ins. Co.* v. *Jersey,* 240 N.Y. 398, 405, 148 N.E. 562, 564). We therefore conclude that there is no basis for advance disqualifications of the arbitrators."
>
> —389 N.Y.S. 2d at 803

As authority for rejecting Fribesco's challenge to the arbitration panel, the trial court cited CPLR 7511(b)(1)

(ii), of the Civil Practice Law and Rules of the State of New York.

From the foregoing, it is apparent not only that the court below had adequate grounds for disposing of this matter purely on the basis of New York State law, but also that the court did in fact resolve this matter purely on the basis of the laws of the State of NewYork. Therefore, this matter does not raise the Federal question necessary to invoke this Court's jurisdiction under 28 U.S.C. § 1257(3) et seq. As a result, Fribesco's petition that this Court issue a Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, Fribesco's petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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BRUCE J. HECTOR
Of Counsel

Supreme Court of the United States

..... TERM, 197....

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,

Petitioners,

—against—

MITSUI & CO., (U.S.A.), INC., FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE S.A., R. PAGNAN & F.LLI, LOUIS DREYFUS CORPORATION and TRADAX OVERSEAS, S.A.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENT TRADAX OVERSEAS, S.A.

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Introduction

Respondent, Tradax Overseas, S.A. ("Tradax") herewith submits its brief in opposition to the petition for Writ of Certiorari of the petitioner, Otello Mantovani ("Mantovani").

Jurisdiction

This Court does not have jurisdiction to grant the Writ of Certiorari sought by petitioner pursuant to 28 U.S.C. §1257(3). Respondent Tradax will demonstrate that the decision below was based upon adequate state grounds; was not a final decision; and does not involve a federal question of substance.

Re-Statement of the Questions Presented

We do not agree with the petitioner's statement of the questions presented, and set forth herein Respondent Tradax' counterstatement of the issues assuming that this Court finds that it has jurisdiction, which we deny.

1. Did Special Term err in holding that there were no public policy questions presented which would nullify the petitioner's agreement to arbitrate all sale contract disputes or supersede the general policy in favor of arbitration?

2. Did Special Term err in holding that mere allegations of bias will not at this stage prevent enforcement of an agreement to arbitrate before a contractually stipulated panel?

Re-Statement of the Case

Respondent Tradax sets forth certain facts pertaining to its dispute with petitioner Mantovani.

On November 19, 1974, Mantovani (an Italian citizen) as buyer, entered into an international export sale contract

with Tradax (a Panamanian corporation) as seller, to purchase 25,000 metric tons of No. 3 U.S. Yellow Corn for delivery FOB from a U. S. Gulf Port. The contract expressly provided that it was subject to the terms and conditions of the North American Export Grain Association Form #2 ("NAEGA-2"). In the applicable printed provisions of the NAEGA-2 form, the corn was expressly warranted to be *not* "free from defect". Instead the parties stipulated:

> "Quality and condition final at loading as per inspection certificate (Appendix E, A25)."

The contract also contained an arbitration clause which provided as follows:

> "Buyer and seller agree that any controversy or claim arising out of, in connection with or relating to this contract, or the interpretation, performance or breach thereof, shall be settled by arbitration in the City of New York before the American Arbitration Association or its successors, pursuant to the Grain Arbitration Rules of the American Arbitration Association, as the same may be in effect at the time of such arbitration proceeding, which rules are hereby deemed incorporated herein and made a part hereof, and under the laws of the State of New York. The arbitration award shall be final and binding on both parties and judgment upon such arbitration award may be entered in the Supreme Court of the State of New York or any other Court having Jurisdiction thereof. Buyer and seller hereby recognize and expressly consent to the jurisdiction over each of them of the American Arbitration Association or its successors, and of all the

Courts in the State of New York. Buyer and seller agree that this contract shall be deemed to have been made in New York State and be deemed to be performed there, any reference herein or elsewhere to the contrary notwithstanding." (Appendix E, A26).

The Grain Arbitration Rules of the American Arbitration Association (hereinafter "AAA"), incorporated by reference in the contract, provided that binding arbitration of all contractual disputes was to be before a commercial panel of arbitrators maintained by the AAA of persons who are "actively engaged in, or have retired from active engagement in, the grain trade business." (Appendix F, A28)

The manner of selection of the arbitrators by the AAA's administrator, as set forth in Section 9 of the Grain Arbitration Rules, was as follows:

"Arbitrations under these Rules shall be held before three arbitrators who, subject to their availability to serve, as determined by the Administrator, shall be chosen by the Administrator from the Panel in alphabetical order of their surnames, starting with the first name on the list and continuing through to the end. For the next and each following arbitration, arbitrators shall be chosen as provided in the preceding sentence, starting with those eligible on the Panel who have not served on the previous arbitration. The same method of choosing arbitrators shall be repeated from the beginning to the end of the Panel as often as is necessary in order to choose the number of arbitrators required for any given arbitration." (Appendix F, A29)

Finally, Section 11 of the Grain Arbitration Rules provided for the following disclosure and challenge procedure:

"A person appointed as an arbitrator shall disclose to the Administrator any circumstances likely to affect his impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such arbitrator or other source, the Administrator shall communicate such information to the parties, and, if the Administrator deems it appropriate to do so, to the arbitrators. Thereafter, AAA shall determine whether the arbitrator should be disqualified and the Administrator shall inform the parties of the decision of AAA." (Appendix F, A29).

The claim of Tradax involved in its November 11, 1975 demand for arbitration arose in the following manner. The bulk carrier vessel MOSGULF was nominated in accordance with the sale contract and arrived to load the cargo of corn which was to be delivered from Cargill Incorporated's Port Allen grain facility at Baton Rouge, Louisiana. However, commencing on or about June 10, 1975 and continually thereafter, Mantovani refused to accept delivery of the corn. The reason proffered by Mantovani to excuse his refusal was, in substance, that the contract terms entitled him to have the sampling of the corn "effectuated" at "the end of the loading spout in the [vessel's] hold" instead of via the mechanical diverter-sampling process installed in the Baton Rouge elevator to get samples for testing and official certification of the quality of the corn by the USDA. Although Tradax pointed out that this

sampling method was approved by USDA for use at Baton Rouge and must be utilized in order to obtain USDA's official certificates of quality as per the contract and that the contract terms did not support Mantovani's position, Mantovani remained adamant in his refusal to accept delivery. As a result of this impasse, Tradax declared Mantovani in default and in due course, submitted its claim for damages from Mantovani's breach of contract in the sum of $769,354.38. Thereafter, on November 11, 1975, Tradax sent Mantovani its Demand for Arbitration for recovery of its damages. Instead of arbitrating in accordance with its contract, Mantovani petitioned on December 23, 1975 for a stay of arbitration pursuant to Article 75 of the New York Civil Practice Law and Rules. Its motion was denied by Special Term (Stecher, J.) on October 6, 1976 (Appendix A) and unanimously affirmed by the New York Appellate Division, First Department (Appendix B) on June 2, 1977. Thereafter, on October 18, 1977, motion for leave to appeal to the New York State Court of Appeals was denied (Appendix C).

ARGUMENT

POINT I

There is no jurisdiction for certiorari under 28 U.S.C. §1257(3) where the state court judgment rests on adequate state grounds.

An adequate state substantive ground bars certiorari, *Henry* v. *Mississippi*, 379 U.S. 443, 446 (1964), citing *Murdock* v. *City of Memphis*, 20 Wall 590; adequate state procedural grounds also bar review on certiorari. *Fay* v. *Noia*, 372 U.S. 391, 428-429 (1963) and cases cited there. A valid

and effective state statute may likewise constitute an adequate ground for this Court to refrain from reviewing the state court decision. *Bell* v. *Maryland*, 378 U.S. 226, 237 (1964).

Here, the Special Term relied expressly on state law in rejecting petitioner's arguments that either a public policy question or alleged potential bias of the panel barred arbitration (Appendix A). *In re National Equipment Rental* and *American Pecco Corp.*, 28 N.Y. 2d 638, 320 N.Y.S. 2d 248 (1971); *Matter of Astoria Medical Group* v. *Health Ins. Co.*, 11 N.Y. 2d 128 (1962); New York C.P.L.R. Sec. 7511 (b)(1)(ii). These are adequate, independent state substantive grounds which bar review in this court.

The state court order compelling arbitration relied on no federal ground. It held (and was affirmed) that "whether the principles underlying the United States Grain Standards Act (7 U.S.C. Sec. 71 et seq.) are being carried out by the Department of Agriculture is not an issue before this Court." (Appendix A2). The Court went on to compel arbitration pursuant to state statute New York C.P.L.R. Sec. 7501 et seq. based upon "a straight forward contract of sale containing a broad arbitration provision." (Appendix A2).

Similarly, the state court's order to arbitrate imports no federal certiorari-jurisdiction question merely because arbitration could have been ordered by either of the parallel state and federal statutes, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Matter of Weinrott*, 32 N.Y. 2d 190, 199 n.2, 344 N.Y.S. 2d 848, 856 n.2 (1973). The state court was not required to and did not rely on the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.) in order-

ing the parties to arbitration. Even if it had relied on the federal statute, the result would have been the same.

In any event, petitioners did not claim a "right, privilege or immunity" under the Federal Arbitration Act in any court below, and could not do so because they resisted the very arbitration which that statute compels (9 U.S.C. Sec. 2).

The state court ruling here for review is thus solidly based on valid state law. It cannot be said that the determination below is "so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irr. Dist.* v. *Farmers Mutual Canal Co.,* 243 U.S. 157, 164 (1916) or "unsubstantial and illusory," *Lawrence* v. *State Tax Commission of Mississippi,* 286 U.S. 276, 282-83 (1932) the criteria required to be found (but not present herein) to permit certiorari jurisdiction.

POINT II

The decision appealed from is not properly reviewable by certiorari because it is not final.

Petitioners appeal from a decision ordering them to arbitration (Appendix A). The Special Term rejected petitioner's arguments that arbitration was improper because of a public policy concern or because of alleged bias in the arbitration panel, relying on New York C.P.L.R. Article 75, specifically Sec. 7511(b)(1)(ii) which provides for application to vacate arbitration awards for partiality of an arbitrator appointed as a neutral and Sec. 7511(b)(1)

which elsewhere provides for vacatur for corruption, fraud, abuse of power or improper procedure. Petitioners will, therefore eventually have the opportunity to raise their objections to the panel in the state court after the arbitration has been held. Moreover, petitioner's claim of "overriding federal policy" immunity can likewise be heard by state courts exercising their general equity powers on a hearing of an application to confirm any award pursuant to New York C.P.L.R. Sec. 7510. *Myers* v. *Kinney Motors, Inc.,* 32 A.D. 2d 266, 301 N.Y.S. 2d 171 (1st Dept., 1969); 8 *Weinstein-Korn-Miller,* N.Y. Civil Practice, Sec. 7510.07.

It is well-settled that this Court will not take jurisdiction of state court decisions which are not final because not dispositive of the rights of any party. *Arceneaux* v. *Louisiana,* 376 U.S. 336 (1964); *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 67 (1948).

This is not a case in which denial of immediate review threatens the exercise of federally protected rights or strong federal policy interests. *Local No. 438 Const. and General Laborer's Union AFL-CIO* v. *Curry,* 371 U.S. 542 (1963). On the contrary, the decision below advances the federal policy favoring arbitration subject to judicial review and enforcement 9 U.S.C. Sec. 1 et seq., *Scherk* v. *Alberto-Culver Co.,* 417 U.S. 506, 510-11 (1974). Nor is this case one in which a concession as to facts makes state proceedings a meaningless gesture. *Mills* v. *Alabama,* 384 U.S. 214 (1966); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). Instead, the privileges petitioners assert depend on the resolution of factual issues yet to be heard by arbitrators or the courts below.

POINT III

This petition does not present any question requiring consideration under Rule 19 of this Court.

Rule 19 of this Court makes clear that review on Writ of Certiorari "is not a matter or right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Respondents submit that the decision below presents no federal question of substance because it involves an international export sale contract, and compelling arbitration of disputes arising out of such a contract is entirely in accord with the decision of this court in *Scherk* v. *Alberto-Culver,* 417 U.S. 506 (1974), as well as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. Sec. 201, et seq.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,

Petitioners,

against

MITSUI & CO., (U.S.A.), INC., FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE S.A., R. PAGNAN & F.lli, LOUIS DREYFUS CORPORATION and TRADAX OVERSEAS, S.A.,

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BRIEF FOR RESPONDENT R. PAGNAN & F.lli IN RESPONSE TO PETITION FOR WRITS OF CERTIORARI

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Restatement of the Case

Our client, the Respondent R. Pagnan & F.lli ("Pagnan"), is an Italian partnership with offices at Padua (Padova), Italy; Petitioner Fribesco S.A. ("Fribesco") is a Swiss corporation with offices at Lausanne, Switzerland; Respond-

ent Finagrain S.A. ("Finagrain") is a Swiss corporation with offices at Geneva, Switzerland; and, Respondent Louis Dreyfus Corporation ("Dreyfus") is a corporation organized under the laws of one of the states of the United States of America, with offices at New York City.

Pagnan is both buyer and seller of the U.S. export corn concerned in two of the disputes mentioned in the Petition, wherein broad arbitration clauses were contained in each of Pagnan's international purchase and sale contracts. In each instance, the market price of the commodity sold f.o.b. ocean going export vessel greatly declined between the dates of contract and the dates of delivery; and, when Pagnan's buyer (Fribesco) precipitiously failed to take delivery of the contracted quantities of grain from Pagnan's sellers (Finagrain and Dreyfus), Pagnan's sellers then demanded arbitration against Pagnan, and Pagnan demanded arbitration against Fribesco.

[Because of the importance of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 21 U.S.T. 2517, T.I.A.S. No. 6997 (Dec. 29, 1970) ("The Convention"), to consideration of the Petition herein, the international quality of the parties and of the instant transactions becomes most important.]

In each instance, Pagnan petitioned the trial level court to direct Fribesco and Pagnan's respective seller to proceed to arbitrate in one consolidated arbitration proceeding, or, alternatively, for the court to direct the manner in which proceedings commenced against Pagnan be otherwise heard and determined together with the proceedings commenced by Pagnan against Fribesco (and for other relief).

As an intermediate buyer and seller, Pagnan has played no part in the inspection controversy which apparently underlies these proceedings. Having been caught up in the middle of this dispute, Pagnan's primary concern is that

the dispute between its buyer and its seller be heard and determined together in one consolidated proceeding (whether before the arbitrators or before a court) in order to avoid a multiplicity of proceedings, expedite determinations and insure each party of appropriate relief. Consequently, Pagnan adopts each and every argument advanced by Fribesco into that portion of the proceedings concerned with its sellers, and Pagnan similiarly adopts each and every argument advanced by its sellers into that portion of the proceedings concerned with Fribesco.

However, Pagnan submits this brief in support of its opinion that further review of this matter by this court may not be warranted because the decisions Petitioners seek to have reviewed (enforcing the arbitration clauses in the instant international commercial contracts, and directing consolidated arbitration proceedings) are in accordance with previous decisions of this court and, further, this court would likely affirm the decisions below on the factual grounds of estoppel and waiver. Pagnan believes that the law and the circumstances of these cases so clearly require that result.

Additional Statutes, Regulations and Treaties Construed

United States Grain Standards Act 7 U.S.C. §§ 75(j), (r); 79(b), (c); 87c; 87e; 87f (Set forth at App. pp. 1a-4a).

5 U.S.C. §§ 701-706 (Set forth at App. pp. 4a-8a).

Regulations of the Dep't of Agriculture, 7 CF.R. §§ 26.30; 26.35; 26.36; 26.45; 26.46; 26.48(a), (e), (f) (Set forth at App. pp. 8a-19a).

Convention of the Recognition and Enforcement of Foreign Arbital Awards, Article II, 21 U.S.T. 2517, T.I.A.S. No. 6997 (December 29, 1970) (Set forth at App. p. 20a).

ARGUMENT

POINT I

The petition has not shown jurisdiction to exist in this Court.

28 U.S.C. § 1257(3) provides, in part, for the jurisdiction of this court to review final judgments of state courts

> ". . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissions held or authority exercised under, the United States."

This court might well determine that the Petition herein fails to supply any basis for a claim that any right asserted under the federal authorities, set forth in 28 U.S.C. § 1257 (3), is violated by Justice Stecher's order directing arbitration. Such determination might be predicated upon a finding that the Petition has failed to show the existence of any federal "right" to stay arbitration.

POINT II

Supreme Court Rule 19 considered: Treaty, Statutory Law and Decisional Law uniformly require enforcement of international commercial agreements to arbitrate.

If this court should determine that jurisdiction exists under 28 U.S.C. § 1257(3), Sup. Ct. R. 19 remains to be considered before this court will exercise its discretionary powers to issue a Writ of Certiorari. That Rule provides in part:

> "1. A review on a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a State court has decided a federal question of substance not theretofore determined by this Court or has decided it in a way probably not in accord with the applicable decisions of this Court."

The below mentioned authorities appear to speak with one voice in favor of upholding international commercial agreements to arbitrate.

The Convention, *supra,* provides that:

> "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable or settlement by arbitration."
>
> Art. II, para. 1.

The federal implementing legislation provides:

> "An arbitration agreement . . . arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . falls under the Convention."
>
> 9 U.S.C. § 202.

In at least two recent cases, this court has forcefully spoken in favor of enforcement of arbitration provisions contained in international commercial agreements, and the lower federal courts have properly followed in directing arbitration in international commercial cases:

Scherk v. *Alberto-Culver Co.,* 417 U.S. 506 (1974);

Bremen v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1971);
Fotochrome, Inc., v. *Copal Co., Ltd.*, 517 F.2d 512 (2d Cir. 1975);
Parsons & Whittemore Overseas Co., Inc. v. *Societe Generale de L'Industrie Du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974);
McCreary Tire & Rubber Co. v. *CEAT S.p.A.*, 501 F.2d 1032 (3d Cir. 1974).

In particular, the case of *Scherk, supra,* is an enlightening commentary on the arguments advanced by the instant Petitioners. Making reference to the U.S. Arbitration Act (9 U.S.C. § 1-14, 201-208), The Convention, that treaty's own enactment into U.S. domestic law at 9 U.S.C. 201, et seq., as well as this court's own decision in *Bremen, supra,* this court found a strong affirmative U.S. policy in favor of arbitration:

> "Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."
>
> at 516.

In enforcing the agreement to arbitrate, this court concluded at 519:

> "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts. . . .' (citing Bremen, supra).
>
> "For all these reasons we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced. . . ."

In reaching its result in *Scherk,* this court distinguished and limited its earlier decision in *Wilko* v. *Swan,* 346 U.S. 427 (1953), upon which Fribesco relies so heavily.

This court found one of the "crucial differences" between the *Wilko* contract and the *Scherk* contract to be that the *Scherk* contract "• • • was a truly international contract." *Id.* at 515.

A second important distinction between the facts presented to this court in *Wilko* and those presented in *Scherk* is that, in *Wilko,* this court determined that ". . . the judicial forum is the kind of 'provision' that cannot be waived under Section 14 of the Securities Act." *Wilko, supra* at 434-5.

The same characteristics found by this court in *Scherk* are present in the instant Dreyfus/Pagnan/Fribesco and Finagrain/Pagnan/Fribesco disputes. First, neither in *Scherk* nor in these disputes, was it determined that the legislature had created an explicit or an exclusive right of recovery in federal (or any other) court. Indeed, in this case, the Grain Standards Act, 7 U.S.C. § 71-87h, itself contains no forum provisions whatever for judicial determination of the rights of the grain buyers and sellers *inter se,* thereby positing an even weaker case for judicial intervention than faced this court in *Scherk.* Second, both *Scherk* and these disputes involve a "truly international agreement," a circumstance in which the upholding of the

freely made choice of forum for the resolution of disputes is paramount.

In connection with this court's Rule 19 decision whether or not to issue the discretionary Writ of Certiorari, this Court should consider that the state court decisions sought to be reviewed are in conformity with the ruling of this Court in *Scherk*.

POINT III

The instant case may not be a proper case for review by this court, as it will likely be decided on the factual grounds of estoppel and waiver.

Even should this court be disposed to render a further decision in the area of the enforcement of arbitration provisions contained in international commercial agreements, this court might well conclude that the precipitious manner of Petitioners' conduct, as well as Petitioners' failure to utilize available administrative and judicial remedies, waived any right to assert a "public policy" argument.

Judicial Remedies Available to Fribesco, But Avoided.

Under the judicial procedures established by 5 U.S.C. §§ 701-706, if Fribesco, at any time, either before or after presenting its vessel to receive its cargo, believed itself to be "inadequately" protected by existing procedures[1] or threatened with "irreparable injury",[2] Fribesco could have immediately sought a judicial determination of the validity of such procedures and regulations which it might have claimed were invalid.

Fribesco never sought any timely judicial determination.

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[1] 5 U.S.C. § 703.

[2] 5 U.S.C. § 705.

Administrative Remedies Available to Fribesco, But Avoided.

In 7 U.S.C. § 75(j), the Grain Standards Act ("GSA") defines the term "official inspection personnel" who are to uniformly "perform functions involved in official inspection under this Act" including the function of handling appeals from determinations made thereunder. 7 U.S.C. § 75(r) further includes Fribesco (as a contract purchaser of grain) within the definition of an "interested person" entitled to make requests for inspection, reinspections and appeal inspections under GSA §§ 79(b) and (c) and under the regulations thereunder promulgated by the Secretary of Agriculture.

Under established United States Department of Agriculture ("USDA") regulations, Fribesco (as an "interested person") could have requested a succeeding original inspection,[3] a reinspection,[4] an appeal inspection by USDA personnel,[5] an appeal inspection by the Grain Division's Board of Appeals and Review,[6] and, if Fribesco so desired, it could have sought judicial review of any adverse administrative decision pursuant to 5 U.S.C. § 703.

In 7 U.S.C. § 79(c), the GSA itself provides for the cancellation of grain inspection certificates superseded by reinspections and appeal inspections which such interested party (as Fribesco) might have requested.

In 7 U.S.C. § 87(c) criminal penalties are provided for violations of the GSA and 7 U.S.C. § 87(f) confers jurisdiction upon the U.S. District Courts.

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[3] 7 C.F.R. § 26.30.

[4] 7 C.F.R. §§ 26.35 and 26.36.

[5] 7 C.F.R. §§ 26.45, 26.46, 26.48(a), (c), (e) and (f).

[6] 7 C.F.R. § 26.50.

Fribesco does not allege that it ever made any request whatsoever of the official inspection agency or of the USDA, or of any court.

Fribesco took none of these actions.

By following proper procedures, Fribesco could have assured to itself a proper judicial review of any USDA action (5 U.S.C. § 704), binding upon that department (and this fact alone should lay to rest Fribesco's claim that United States public policy somehow requires that the instant matter—to which the USDA is not a party—should be determined by a court).

We note that the following cases would hold that Fribesco's refusal to challenge existing USDA regulations and customary procedures by taking advantage of existing judicial and administrative procedures designed to protect it against erroneous determinations of grade, which procedures (1) might have enabled Fribesco to obtain inspection procedures subsequent to the mechanical sampling device to which it objected, and (2) would have resulted in a determination binding upon the USDA, now precludes Fribesco from attacking these same regulations (both before the courts and before the arbitrators). *Farmers Elevator Mutual Ins. Co.* v. *Stanford,* 280 F. Supp. 523 (N.D. Texas 1967) *aff'd,* 5th Cir. 1969, 408 F.2d 776 (5th Cir. 1969), *Elbow Lake Coop. Grain Co.* v. *Commodity Credit Corp.,* 144 F. Supp. 54 (D. Minn. 1956) *aff'd,* 251 F.2d 633 (8th Cir. 1958) and *Farmers Coop. Elevator Co.* v. *Commodity Credit Corp.,* 1956, 144 F. Supp. 65 (D. So. Dak. 1956).

These cases stand for the proposition that neither the allegation that the method of sampling violated a regulation of the Secretary,[7] nor the allegation that the method of

[7] Elbow Lake, supra, at pp. 57 and 59, Farmers Coop. Elevator Co., supra, 65 at pp. 67 and 70.

taking an appeal was not proper,[8] nor the allegation that the Secretary lacked jurisdiction to make the inspection,[9] can be asserted in collateral proceedings by a party which failed to avail itself of the reinspection, appeal and other administrative review procedures established by regulation of the Secretary as provided in the GSA, and by the provisions of the Administrative Procedure Act, 5 U.S. Code 701, et seq.

In view of the comprehensive GSA scheme of administrative review by reinspection and by appeal inspection, etc., the judicial determinations in *Elbow Lake, supra,* and *Farmers Elevator Mut. Ins. Co., supra,* indicate that the reliance which Fribesco places on the patent law case of *Lear Inc.* v. *Adkins,* 395 U.S. 653 (1969), is misplaced. Contrary to the comprehensive administrative and judicial procedures available in grain matters (wherein Fribesco had full opportunity to raise all issues it might have desired to raise), there is no similar opportunity to raise issues in the patent matters discussed in the *Lear* case. This crucial distinction is obvious from the mere reading of *Lear,* wherein this Court recognized that

> ". . . the Patent Office is often obliged to reach its decision in an ex parte proceeding without the arguments which could be advanced by parties interested in proving patent invalidity. Consequently, it does not seem to us to be unfair to require a patentee to defend the Patent Office's judgment when his licensee places the question in issue. . . ." ID at 670.

We submit that a doctrine more appropriate to the facts of this case is the doctrine requiring exhaustion of avail-

[8] Elbow Lake, supra, at p. 59 and Points 8 and 9 at pp. 62-63 Farmers Coop. Elevator Co., supra, at p. 70.

[9] Elbow Lake, supra, and Point 9 at pp. 62-63.

able administrative remedies before resort is had to the courts. We submit that

> "The necessity for prior administrative consideration of an issue is apparent where, as here, its decision calls for the application of technical knowledge and experience not usually possessed by judges." *F.P.C.* v. *Colorado Interstate Gas Co.*, 308 U.S. 492, 501 (1955).

In connection with this court's Rule 19 decision, whether or not to issue the discretionary Writ of Certiorari, this court should consider that this matter would likely be resolved on the factual grounds of estoppel and waiver.

Conclusion

Pagnan is the proverbial "man in the middle". Its main concern is that each dispute between itself and its buyer and sellers be heard in one consolidated proceeding to insure each party of appropriate relief and to keep costs to a minimum.

To this end, Pagnan contends that a review by this court of the instant proceedings may not be warranted because of lack of proper jurisdiction, lack of proper subject matter for the granting of the Writ, and, if the Writ were in fact given, that the court would affirm the lower court ruling either on the ground of its conformance with the court's prior decisions or on the ground of estoppel and waiver.

Respectfully submitted,

BENNET HUGH SILVERMAN
Counsel for Respondent,
R. Pagnan & F.lli

APPENDIX

APPENDIX A

Statutes and Regulations.

United States Grain Standard Act (Title 7, U.S.C. §§ 71-87h)

75(j) The term "official inspection personnel" means persons licenced or otherwise authorized by the Administrator pursuant to section 84 of this title to perform all or specified functions involved in official inspection, official weighing, or supervision of weighing, or in the supervision of official inspection, official weighing or supervision of weighing;

(r) the term "interested person" means any person having a contract or other financial interest in grain as the owner, seller, purchaser, warehouseman, or carrier, or otherwise;

Inspection made pursuant to request of interested persons

79(b) The Administrator is further authorized, upon request of any interested person, and under such regulations as he may prescribe, to cause official inspection to be made with respect to any grain whether by official sample, submitted sample, or otherwise within the United States under standards provided for in section 76 of this title, or, upon request of the interested person, under other criteria approved by the Administrator for determining the kind, class, quality, or condition of grain, or quantity of sacks of grain, or other facts relating to grain, whenever in his judgment providing such service will effectuate any of the objectives stated in section 74 of this title.

Reinspection and appeals; cancellation and surrender of superseded certificates; sale of samples

(c) The regulations prescribed by the Administrator under this chapter shall include provisions for reinspec-

tions and appeal inspections; cancellation and surrender of certificates superseded by reinspections and appeal inspections; and the use of standard forms for official certificates. The Administrator may provide by regulation that samples obtained by or for employees of the Service for purposes of official inspection shall become the property of the United States, and such samples may be disposed of without regard to the provisions of the Federal Property and Administrative Services Act of 1949, as amended.

§ 87c. Criminal penalties

(a) Any person who commits an offense prohibited by section 87b of this title (except an offense prohibited by paragraphs (a)(7), (a)(8), and (b)(4) in which case he shall be subject to the general penal statutes in Title 18 relating to crimes and offenses against the United States) shall be guilty of a misdemeanor and shall, on conviction thereof, be subject to imprisonment for not more than twelve months, or a fine of no more than $10,000, or both such imprisonment and fine; but, for each subsequent offense subject to this subsection, such person shall be guilty of a felony and shall, on conviction thereof, be subject to imprisonment for not more than five years, or a fine of not more than $20,000, or both such imprisonment and fine.

(b) Nothing in this chapter shall be construed as requiring the Administrator to report minor violations of this chapter for criminal prosecution whenever he believes that the public interest will be adequately served by a suitable written notice or warning, or to report any violation of this chapter for prosecution when he believes that institution of a preceeding under section 86 of this title will obtain compliance with this chapter and he institutes such a proceeding.

(c) Any officer or employee of the Department of Agriculture assigned to perform weighing functions under this chapter shall be considered as an employee of the Department of Agriculture assigned to perform inspection functions for the purposes of sections 1114 and 111 of Title 18.

§ 87f. Enforcement provisions—Subpoena power

(a) For the purposes of this chapter, the Administrator shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person with respect to whom such authority is exercised; and the Administrator shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation by the Administrator, and may administer oaths and affirmations, examine witnesses, and receive evidence.

Disobedience of subpoena

(b) Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States at any designated place of hearing. In case of disobedience to a subpoena the Administrator may invoke the aid of any court designated in paragraph (h) of this section in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Court order requiring attendance and testimony of witnesses

(c) Any such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Administrator or to produce documentary evidence if so ordered, or to

give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Fees and mileage costs of witnesses

(d) Witnesses summoned before the Administrator shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses from whom depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Violation of subpoena as misdemeanor

(e) Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the Administrator, shall be guilty of a misdemeanor, and upon conviction thereof be subject to the penalties set forth in subsection (a) of section 87c of this title.

5 U.S.C. §§ 701-706

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such

action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required

by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrtary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pertinent Provisions of Regulations under the United States Grain Standards Act (in force at time that the present action arose).

§ 26.30 Succeeding original inspections.

(a) *General provisions.* In cases where an original inspection has been obtained in any designated inspection area on a specific lot or submitted sample of grain, and a later or more current inspection of the same kind (scope) is desired in the same area on the same lot or sample of grain, one or more succeeding original inspections may be obtained in accordance with paragraphs (b) through (i) of this section.

(b) *Requests.* A request for a succeeding original inspection shall be made in accordance with the provisions for original inspections in § 26.25 and 26.26. Each request shall show the identity of the preceding original inspection

certificate(s). If a request is not for the same kind (scope) of inspection, it will be deemed to be a request for an original inspection.

(c) *Grounds for dismissal.* A request for a succeeding original inspection may be withdrawn or dismissed in accordance with the provisions of § 26.10 and 26.27, or when a reinspection or an appeal inspection can be obtained from the preceding original inspection and will better fit the needs of the applicant.

(d) *Scope, order, and method of inspection.* (1) The scope of each succeeding original inspection shall be in accordance with the request for the original inspection. The method and order of performing a succeeding original inspection shall be in accordance with the provisions of § 26.12.

(2) For the purpose of this section, statistical tolerances for expected variations between inspections shall be applied to the results of the succeeding original inspection in determining whether the results of the preceding original inspection(s) were or were not materially in error. The statistical tolerances shall, in all cases, be those set forth in the instructions.

(e) *Certification.* For each succeeding original inspection, an official certificate shall be issued in accordance with § 26.29, subject to the following provisions: (1) In performing a succeeding original inspection, the official inspection personnel shall determine whether the results of the preceding inspection(s) are materially in error. If the results are not materially in error, the results of the preceding original inspection(s) and the results of the succeeding original inspection shall be averaged, and the resulting averages shall be shown on the official certificate for the succeeding original inspection. If the results of

the preceding original inspection(s) are materially in error, only the results of the succeeding original inspection shall be shown on the official certificate for the succeeding original inspection.

(2) The certificate for a second original inspection shall show the statement "Second Original Inspection". Certificates for succeeding original inspections in the same designated inspection area shall similarly identify the succeeding original inspections in numerical order.

(3) An official certificate for a succeeding original inspection shall supersede the last preceding official certificate for the same kind (scope) of inspection. In such case, the succeeding certificate shall clearly show, in the space provided for remarks, the following statement in completed form: "This certificate supersedes certificate No. dated ." (The number shown in the statement shall, in all cases, include the lettered prefix.) The superseded certificate shall be considered null and void as of the date of the issuance of the succeeding certificate and shall not thereafter be used to represent the grain described therein.

If the superseded certificate is in the custody of the official inspection agency or the Grain Division, the superseded certificate shall be marked "Void" in a clear and conspicuous manner. If, at the time of issuing the succeeding official certificate, the superseded certificate is not in the custody of the official inspection agency or the Grain Division, the statement "The superseded certificate identified herein has not been surrendered" shall be clearly shown in the space provided for remarks on the succeeding official certificate. Official inspection personnel shall exercise such other precautions as may be found necessary to prevent the fraudulent or unauthorized use of the superseded certificate.

(f) *Reinspections.* A reinspection or appeal inspection may be obtained from any succeeding original inspection in accordance with the provisions of §§ 26.35 through 26.39 and §§ 26.45 through 26.50.

(g) *Applicable to all movements.* The provisions of this section shall be applicable to any type of movement or any combination of movements (in, out, local) within a designated inspection area.

(h) *Loss of identity.* If the identity of a lot or submitted sample of grain is lost as provided in § 26.17, an original inspection may be obtained on the grain without reference to any previous inspection.

(i) *Inspection in other area.* If grain has been inspected in one designated inspection area and has moved to another area, any applicant may obtain an original inspection in the other designated inspection area. Such inspection in the other area shall be considered an original inspection and not a succeeding original inspection.

§ 26.35 Who may request a reinspection.

(a) *General.* A reinspection from an original inspection (or succeeding original inspection) may be requested by any interested person who desires the service.

(b) *Limitations.* One or more interested persons may request a reinspection but only one reinspection may be obtained from any original inspection (or succeeding original inspection). No reinspection may be obtained from an inspection resulting in issuance of a certificate that has been superseded, or from a reinspection.

§ 26.36 Where and when to request a reinspection and information required.

(a) *Where to file.* A request for a reinspection shall be filed with the official inspection agency, or in the case of

U.S. grain in Canadian ports, with the field office, in the designated inspection area in which the original (or succeeding original) inspection in question was made, or with the official inspection agency, or in the case of U.S. grain in Canadian ports, the field office, in the designated inspection area in which the grain is located. If the request is made orally or by telegraph, it shall, at the request of the official inspection agency, or field office, be confirmed in writing in accordance with paragraph (b) of this section. (For locations where inspection services are available, see § 26.9(d).)

(b) *Written confirmation.* If a written confirmation is requested, it shall be signed by the applicant or his agent; and shall, except as provided in paragraph (c) of this section, show, or be accompanied by, the following information or documents: (1) The identification, quantity, and the specific location of the grain, if known; (2) the reason for requesting the reinspection, stated in terms of the factor or factors in question (not applicable to requests filed in advance); (3) the name and mailing address of the applicant; (4) the original official certificate for the inspection in question; (5) a statement showing whether a request for a reinspection, or a request for an appeal inspection, on the grain in question has been filed with any other official inspection agency, or with the Grain Division, and the place of filing, if any; and (6) such other pertinent information as may be required in specific cases by the official inspection agency or field office conducting the reinspection. (Copies of an approved application form will be furnished by an official inspection agency or field office upon request.)

(c) *Delayed documents.* (1) If the information or documents required by paragraph (b) of this section are not available at the time of filing the request, the applicant

shall submit the information or documents, or cause them to be submitted, as soon as they are available. At the discretion of the official inspection agency, or in the case of U.S. grain in Canadian ports, the field office conducting the reinspection, action on the reinspection may be withheld pending the receipt of the information or documents required by paragraph (b) of this section.

(2) In no case shall a reinspection certificate be issued unless the information and documents required by paragraph (b) of this section are filed with the official inspection agency, or in the case of U.S. grain in Canadian ports, the field office, or it is found by the official inspection agency, or the field office, that some of the information or documents are not available but sufficient information is available to enable performance of the reinspection. If it is found that any of the required information or documents is not available, a record of the finding shall be included in the record of the reinspection.

(d) *When to file.* (1) A request for a reinspection must be filed (i) before the grain has left the designated inspection area where the grain was located when the inspection in question was made; (ii) before the identity of the grain has been lost, as provided in § 26.17 and (iii) as promptly as possible, but not later than the close of business on the second business day following the date of the inspection in question.

(2) If a representative file sample, as prescribed in § 26.8(f), is available, the official inspection agency, or in the case of U.S. grain in Canadian ports, the field office, conducting the reinspection may, upon written request by the applicant and the respondents, if any, waive the requirements of subparagraph (1) of this paragraph. The requirement in subparagraph (1)(iii) of this paragraph, may also be waived by the official inspection agency, or the

field office, upon a satisfactory showing by any interested person of the existence of fraud or that on account of distance or other good cause the time allowed for filing was not sufficient.

(3) A record of each waiver action must be included by the official inspection agency, or the field office, in the record of the reinspection.

(e) *Advanced notice.* If desired by the applicant, requests for reinspections may be filed in advance of the original (or succeeding original) inspection which is in question.

(f) *Multiple request.* A request for a reinspection may cover one or more identified lots or samples.

(g) *Recording date of filing.* A request for a reinspection shall be deemed filed when it is received by the official inspection agency, or in the case of U.S. grain in Canadian ports, the field office, conducting the reinspection and when the grain is offered for inspection. A record showing the date of filing shall be made promptly by the official inspection agency, or field office.

§ 26.45 Who may request an appeal inspection.

(a) *General.* An appeal inspection from an original inspection (or succeeding original inspection) or a reinspection may be requested by any interested person who desires the service. (See also § 26.50 concerning a Board appeal inspection.)

(b) *Limitations.* One or more interested persons may request an appeal inspection but only one appeal inspection may be obtained from any original inspection (or succeeding original inspection), or from any reinspection. (A Board appeal inspection may be obtained only from an appeal inspection conducted by a field office.) No appeal

inspection may be obtained from any inspection resulting in the issuance of a certificate that has been superseded by another certificate.

§ 26.46 Where and when to request an appeal inspection and information required.

(a) *Where to file.* A request for an appeal inspection shall be filed with the field office in the circuit in which the original inspection or reinspection in question was made, or with the field office in the circuit in which the grain is located. If the request is made orally, it shall be confirmed in writing in accordance with paragraph (b) of this section. (For locations where inspection services are available, see § 26.9(d).)

(b) *Written confirmation.* Each request for an appeal inspection shall be in writing; shall be signed by the applicant or his agent; and except as provided in paragraph (c)(2) of this section, shall show, or be accompanied by, the following information or documents: (1) The identification, quantity, and specific location of the grain, if known; (2) the reason for requesting the appeal inspection, stated in terms of the factor or factors in question (not applicable to requests filed in advance); (3) the names and mailing addresses of the applicant and the respondents, if any; (4) the original official certificate for the inspection in question; (5) a statement showing whether a request for an appeal inspection on the grain in question has been filed with any other field office, and the other place of filing, if any; and (6) such other pertinent information as may be required by the field office in specific cases. (Copies of an approved application form will be furnished by field offices upon request.)

(c) *Delayed documents.* (1) If the information or documents required by paragraph (b) of this section are not

available at the time of filing the request, the applicant shall submit the information or documents, or cause them to be submitted, as soon as they are available. At the discretion of the field office conducting the appeal inspection, action on the appeal inspection may be withheld pending the receipt of the information or documents required by paragraph (b) of this section.

(2) In no case shall an appeal inspection certificate be issued unless the information and documents required by paragraph (b) of this section are filed in the field office, or it is found by the field office that some of the information or documents are not available but sufficient information is available to enable performance of the appeal inspection. If it is found that any of the required information or documents is not available, a record of the finding shall be included in the record of the appeal inspection.

(d) *When to file.* (1) For lots which are to be inspected during loading, unloading, or handling, a request for an appeal inspection shall be filed in advance of the inspection in question.

(2) For lots other than the lots identified in subparagraph (1) of this paragraph and for submitted samples, a request for an appeal inspection must be filed (i) before the grain has left the designated inspection area where the grain was located when the inspection in question was made; (ii) before the identity of the grain has been lost, as provided in § 26.17; and (iii) as promptly as possible, but not later than the close of business on the second business day following the date of the inspection in question.

§ 26.48 Who shall handle appeal inspections, and method and order of performance.

(a) *United States.* An appeal inspection on grain located in the United States shall be conducted by a field office.

(b) *Canada.* An appeal inspection on U.S. grain in Canadian ports shall be conducted by the Board of Appeals and Review.

(c) *Scope.* The scope of an appeal inspection shall be confined to the scope of the inspection in question: *Provided,* That an appeal inspection for grade shall include a review of all factors which may determine the accurate and true grade at the time and place of the appeal inspection.

(d) *Method and order.* The method and order of service shall be in accordance with the provisions of § 26.12. For the purpose of this section, statistical tolerances for expected variations between inspections shall be applied to the results of the appeal inspection in determining whether the results of the inspection in question were or were not materially in error. The statistical tolerances shall, in all cases, be those set forth in the instructions.

(e) *New sample.* Upon request of the applicant, and if practicable, a new sample shall be obtained and examined as a part of an appeal inspection.

(f) *Conflict of interest.* No grain inspection supervisor shall perform, or participate in performing, or issue an official certificate for an appeal inspection involving the correctness of inspections performed or certificated by him: *Provided,* That this requirement is waived if there is only one duly qualified person available at the time and place of the appeal inspection.

§ 26.50 Appeal Inspection by Board of Appeals and Review.

(a) *Formation of Board.* The Board of Appeals and Review in the Grain Division is responsible for the supervision of the official inspection of grain to maintain uniformity and accuracy of inspection, and to perform appeal inspec-

tions in accordance with the Act and regulations. For the purpose of this section the Board of Appeals and Review shall be considered a field office with the entire United States and Canada as its circuit.

(b) *Who may request.* An appeal inspection by the Board of Appeals and Review may be requested by an applicant from an inspection conducted by a field office.

(c) *Filing requirements.* (1) A request for an appeal inspection by the Board of Appeals and Review shall be filed with the field office which conducted the inspection in question, or with the field office in the circuit in which the grain is located, or with the Board of Appeals and Review.

(2) Except as otherwise provided in this paragraph, each request shall be filed in accordance with the provisions of §§ 26.45 and 26.46, and the request may be withdrawn or dismissed in accordance with the provisions of § 26.47. Each request shall show pertinent information specified in the form or as may be required in specific cases by the Board of Appeals and Review, and shall be filed not later than the close of business on the next business day after the date of the inspection in question. The Board of Appeals and Review may, for good cause shown, extend the time for filing the request. (Copies of an approved application form will be furnished by field offices upon request.)

(d) *Performance and issuance.* The appeal inspection shall be performed in accordance with the provisions of § 26.48; and an appeal inspection certificate shall be issued in accordance with the provisions of § 26.49. An appeal inspection certificate issued by the Board of Appeals and Review shall be the final appeal inspection certificate.

(e) *Action by field office.* The field office which conducted the inspection in question shall act in a liaison capacity

between the applicant requesting the appeal inspection and the Board of Appeals and Review, and shall promptly forward to the Board of Appeals and Review all available samples, documents, and other evidence pertaining to the inspection in question.

APPENDIX B

Treaties.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS
21 U.S. T. 2517, T.I.A.S. No. 6997

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.